IN THE CAYMAN ISLANDS COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 14 OF 1987

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE GEORGES, J.A.
THE HONOURABLE MR. JUSTICE ROWE, J.A.

Reported
6-04-88

G.C. # 419/84

BETWEEN:	HADSPHALTIC INTERNATIONAL LIMITED	DEFENDANT/APPELLANT
AND:	TOWER CORPORATION LIMITED	PLAINTIFF/RESPONDENT

G.C. # 503/85

BETWEEN:	HADSPHALTIC INTERNATIONAL LIMITED	PLAINTIFF
AND:	MAPLES & CALDER	DEFENDANT

Mr. Ian Croxford with Mr. D. Jones instructed by David Ritch of Ritch and Conolly for the appellant.
Mr. Harvey, Q.C. with Mr. Angus Foster of W.S. Walker & Co. for Maples and Calder.
Tower Corporation is not represented and does not appear.

Hearing: Friday & Saturday, October 23-24, 1987, & April 6, 1988

ZACCA, P:

This Action Cause 419 of 1984 arose as a result of a multi-storey Commercial Building being sold by Auction. Tower Corporation Limited (Tower) entered into a contract with Hadsphaltic International Limited (Hadsphaltic) for the construction of a multi-storey building. The land which was owned by Tower was charged in favour of Hadsphaltic to cover the construction costs. Tower defaulted and the property was sold at auction and bought by the Government of the Cayman Islands for $4,650,000.00. Tower contended that the sale was at an under value and brought this action against Hadsphaltic.

Hadsphaltic then brought an action, Cause 503 of 1985 against Maples and Calder, a firm of Solicitors in the Cayman Islands, alleging negligence on their part in advice given to them relating to the conduct of the action.

By Consent, the two actions were ordered to be tried together. On March 4, 1986 the Grand Court made the following order:

Order:

(1) That the above two actions (Cause No. 419 of 1984 and Cause No. 503 of 1985) be tried at the same time (Cause 419 of 1984 to lead) ;

(2) That no Order be made in respect of the summons dated and filed in the above two actions on February 27, 1986 on behalf of the said Hadsphaltic International Limited ;

(3) That costs be reserved.

A second Consent Order was made by the Grand Court on September 23, 1986 whereby it is ordered :

1. That each of the parties to Cause No. 419 of 1984 and Cause No. 503 of 1985 ("the two actions") do serve on the other parties to the two actions copies of all their pleadings and Further and Better Particulars filed in the two actions.

2. That in so far as they have not already done so each of the parties to the two actions do serve on the other parties to the two actions on or before October 10, 1986 a list of documents and that there be mutual inspection of the documents on the said lists immediately thereafter.

3. That all evidence given at the concurrent trial of the two actions shall be evidence in both actions.

4. That Maples and Calder shall be bound by the result of Cause No. 419 of 1984.

5. That Tower Corporation Limited and Maples and Calder do mutually exchange their experts' reports on or before November 7, 1986 and that Hadsphaltic International Limited and Maples and Calder do mutually exchange their experts' reports on or before November 7, 1986.

6. That each of the three parties to the two actions do use their best endeavours to mutually exchange

any supplemental experts' reports on or before December 19, 1986.

7. That each of the parties to the two actions be at liberty to call expert witnesses limited to those witnesses the substance of whose evidence has been so disclosed as aforesaid and to 5 experts for each party.

8. That each of the three parties to the two actions be at liberty to cross-examine witnesses called by any other party to the two actions.

9. That Tower Corporation Limited shall pay Maples and Calder's and Hadsphaltic International Limited's costs of and occasioned by the above Summons to be taxed if not agreed. Certified fit for 2 Counsel.

AND IT IS FURTHER ORDERED:

10. That the provisional date set for the trial of the two actions, namely February 5, 1987, be adhered to.

11. That Tower Corporation Limited do set the two actions down for hearing in terms of Rule 48 of the Grand Court (Civil Procedure) Rules within 21 days of this date.

An application made by Hadsphaltic during the course of the hearing to strike out Tower's Cause of action was dismissed by the Grand Court Judge.

The hearing of the two actions commenced in February 1987. On August 31, 1987 being the 98th day of trial, both Counsel for Tower withdrew from the case. Thereafter, Tower was not represented, although a member of the Company was in attendance

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at Court. The trial had reached the stage where Tower had completed and closed its case. Hadsphaltic had nearly completed its case by way of defence to Tower's claim and by way of presenting its claim against Maples and Calder. By consent, Hadsphaltic reserved the right to interpose a final witness in the course of the hearing of Hadsphaltic's case against Maples and Calder. This was done for the convenience of the witness. Maples and Calder had opened their case and called their first witness. It was during the course of cross-examination of this witness that both Counsel for Tower withdrew from the case.

It was on this basis of the non-appearance of Counsel for Tower that the application was made by Hadsphaltic to strike out Tower's claim.

The application to strike out was based on section 58 of the Judicature Law No. 11 of 1975. In the alternative, the provisions of 035 R1 of the Rules of the Supreme Court was relied upon.

Objection was taken to Maples and Calder's Counsel being heard in the appeal. It was submitted that the appeal was as between Tower and Hadsphaltic. Mr. Croxford relied on Enoch v. National Coal Board, 1978, 122 S.J. 401 a case in which a Third Party was not allowed to make an application in a case between the Plaintiff and the Defendant. It was contended further that the two actions were separate actions.

The Orders made by the Grand Court Judge to which the parties consented was that the two causes of action should be tried together. It was also ordered by consent that all the evidence given at the concurrent trial of the two actions shall be evidence in both actions. It was further ordered that Maples and Calder shall be bound by the decision in Cause No. 419 of 1984. Clearly, any decision to strike out the claim in Cause No. 419 of 1984 would affect Maples and Calder. A decision on the merits in the claim by Tower against Hadsphaltic could determine any liability on the part of Maples and Calder to indemnify Hadsphaltic.

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In my view, the learned Grand Court Judge was correct in hearing Counsel on the application and for the reasons stated above, I concurred that Mr. Harvey should be allowed to address the Court on the hearing of the appeal.

Section 58 of the Judicature Law, 1975 provides :

> " 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. "

It was submitted that a limited liability Company could only appear by Counsel. There is no provision in Cayman which deals with the manner in which a limited liability Company may appear in the Grand Court. The proviso to Rule 62(2) of the Grand Court (Civil Procedure) Rules provides that the Rules applicable in the High Court of Justice in the United Kingdom would apply in these circumstances.

Rule 5/6/2 of the Supreme Court Practice, 1988 provides :

> " Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a Solicitor. "

The Supreme Court Practice, 1988 in paragraph 4665 also provides :

> " A Company cannot take part in any proceedings before the Court except by Counsel or (in Chambers) by a Solicitor. "

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These rules would apply in the Cayman Islands and Tower can only appear by Counsel or an Attorney-at-Law qualified to practise law in the Cayman Islands.

If Tower did not appear by Counsel or an Attorney-at-Law qualified to practise in the Cayman Islands when the application to strike out was made, should the action have been struck out by the learned Grand Court Judge ? This would depend on whether the provisions of section 58 of the Judicature Law applied to the 98th or 99th day of the proceedings.

Mr. Croxford submitted that in the adversary system, it is an essential element that from the first day of trial to the last day of judgment, the Plaintiff must appear to prosecute his case. If he does not appear at any time, then section 58 applies and the cause shall be struck out.

Mr. Croxford in pursuance of this submission relied on a passage taken from the 7th Edition of Blackstone's commentaries, 1775, pp. 35-36 and also referred to various English Statutes, the rules of the Supreme Court in the United Kingdom, the County Court Rules and a number of decided cases.

Mr. Harvey contended that section 58 of the Judicature Law 1975 applied only to the first day of the hearing and that this provision in the law was taken from the Resident Magistrates' law of Jamaica. The County Court provisions and the provisions in the Resident Magistrates' Law of Jamaica will be looked at.

The following passage appears in the 7th Edition of Blackstone's Commentaries, 1775 at pp. 35-36 :

> " But here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in answer to the King's Writ, it is necessary that both the parties be kept or continued in Court from day to day, till the final determination of the writ. For the Court can determine nothing, unless the presence of both the parties, in person or by

> their Attorneys, or upon default of one of them, after his original appearance and a time pre-fixed for his appearance in Court again .....
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> And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on, from time to time, as the exigencies of the case may require. The giving of this day is called the 'continuance' because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged sine die, without a day, for this turn: for by his appearance in Court he has obeyed the command of the King's writ; and unless he be adjourned over to a day certain, he is no longer bound to attend upon the summons but he must be warned afresh and the whole must begin de novo. "

Mr. Croxford submitted that the wording of section 58 of the Judicature Law is taken from the County Court Act 1888. Mr. Harvey was of the view that the wording is derived from the Resident Magistrates' Law of Jamaica.

The Resident Magistrate's Court in Jamaica is a summary procedure where cases are dealt with expeditiously and summarily.

The qualification for the appointment of a Judge of the Grand Court was provided for in section 6 of the Cayman Islands Government Law of 1893. The qualification was the same as that for a Resident Magistrate in Jamaica. The section provided for a Resident Magistrate in Jamaica to be appointed a Judge of the Grand Court in conjunction with his post as Resident Magistrate.

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The Cayman Islands Administration of Justice Law 1894 provided in section 85 that the rules relating to the Resident Magistrates' Courts in Jamaica were applicable to the Grand Court. The procedure in the Grand Court was therefore a summary procedure similar to that of the procedure in the Resident Magistrates' Courts in Jamaica.

The County Court Act 1888 provided in section 88 :

> " If upon the return day or at any continuation or adjournment of the Court, or of the action or matter, the Plaintiff shall not appar, the action or matter shall be struck out... "

It is to be observed that the words "the cause shall be put down to the bottom of the list of causes for trial at that Court; and if on its hearing again reached the Plaintiff does not appear, the cause shall be struck out" does not appear in the English County Court Act but appears in section 58 of the Judicature Law and the Resident Magistrates' Law.

If it is necessary to consider the historical origin of section 58 of the Judicature Law, it is my view that it is derived from the Resident Magistrates' Law of Jamaica and not the County Court Act 1888.

It is also to be observed that the word "continuation" is absent from the provisions of section 58. The County Court Act and the Resident Magistrates' Law both speak of 'continuation' or 'adjournment' of the Court. Does this omission give support to the view that section 58 is referring to the Return Day and not to a second or subsequent day of a trial ?

In Armour v. Bate, 1891, 2 Q.B. 233, the Plaintiff did not appear and it was held that the action should be dismissed in default of the appearance of the Plaintiff in conformity with 036 r. 32. It appears that this case was one in which the Plaintiff failed to appear on the first day of trial.

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The case of Armour v. Bate was referred to in the Trinidad case - Charles McEnearney and Co. Ltd. v. Swift, 1970, 16 W.I.R. 387; 1971, 16 W.I.R. 391. In this case, the Plaintiff did not appear and a counter claim filed by the defendant was not pursued. The action was ordered dismissed - the Plaintiff not appearing. This was based on the Trinidad rule which was similar to that of 036 r. 32 of the Rules of the Supreme Court of England. On the Plaintiff bringing a second action, the plea of Res Judicata was raised by the defence - the Court held that the plea of Res Judicata did not apply.

Again it appears that the action was dismissed on the first day of trial and the facts are not similar to the facts of the instant case.

Jordan v. Jones and another 1880,J.P. Reports was a case in which the County Court Judge adjourned the hearing for a witness of the Plaintiff to be called. When the day to which the case was adjourned arrived, the Plaintiff did not appear. It was held that the cause should have been struck out under section 79 of the County Courts Act 1846.

It appears that this claim was struck out not on the first day of hearing but on a subsequent date.

In Jennings and wife v. The London General Omnibus Company (No. 2), 1871 XXX L.T. 610, the Plaintiff's Counsel applied for an adjournment on the ground that the Plaintiff's wife who was to be a witness was seriously ill. The trial Judge refused the application and in so doing made certain comments in the presence of the Jury to which Counsel objected as being prejudicial. Counsel and the Plaintiff withdrew from the case. The case was struck out and on the following day an application was made to re-list the case. This was refused. On the matter coming up before the Court of Exchequer, it was held that the non-appearance of the Plaintiff on the day appointed for hearing except for an adjournment being granted, would have the effect of the cause being at an end and the matter could not be re-listed. However, it was still open to the Plaintiff to bring a fresh action.

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Again it appears that the case was dismissed on the first day of the hearing.

The words in section 58 of the Judicature Law "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" envisages a number of cases being set down for hearing on a particular date. If on that date the Plaintiff does not appear, the case shall be struck out.

In my opinion, the words of section 58 of the Judicature Law applies only to the first day of the hearing and at a time when the trial had not begun. It cannot apply to a second or subsequent day of a trial.

Mr. Croxford submitted that if section 58 does not apply then the Court should have dismissed the Plaintiff's case under 035 r. 1 of the 1985 Supreme Court Practice. The rule provides :

(1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice however, to the restoration thereof, on the discretion of a Judge ;

(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 counter claim in the absence of that party.

This rule provides that if a Plaintiff appears but the defendant does not appear, the Plaintiff may proceed to prove his claim. If the Plaintiff fails to appear but the defendant appears, then the Plaintiff's claim is dismissed, or if there is a counter claim, the defendant may proceed to prove his counter claim. The wording of this rule supports the view that the rule applies on the first day of the hearing.

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I am therefore of the view that the learned Chief Justice's finding that the rule only applies when the case is called on for hearing is correct. This rule cannot therefore apply to a situation where a stage has been reached in a trial where the defendant has almost completed his case and would have completed his case but for the convenience of a defendant's witness.

The position therefore is that there is no specific provision or rule which would apply to a stage such as the one reached in the instant case. It must therefore be left to the discretion of the Judge to reach a decision which would do justice to the particular case.

Mr. Harvey has pointed out many injustices which could occur if a Plaintiff's case is struck out on the 98th day of hearing. The Court could be manipulated by a Plaintiff who is not happy with the way his case is proceeding. He could then not appear on any day and if Mr. Croxford's contention is correct, the Judge would have no alternative but to strike out the Plaintiff's case. This could be to the disadvantage of the defendant. The Plaintiff at a later date could bring a fresh action and start all over again.

In the case before us, the Plaintiff had closed its case; the defendant's case would also have been completed but for the concession granted to interpose a defence witness at a later stage of the proceedings. Maples and Calder was presenting its case. The Plaintiff was not interested in Maples and Calder's case.

The case had reached a stage where the learned Judge could have arrived at a decision on Plaintiff's claim based on the evidence presented.

In my opinion, to have struck out the Plaintiff's case at this stage would have amounted to a grave injustice.

The learned Chief Justice correctly exercised his discretion in refusing the application to strike out the Plaintiff's case.

It was for these reasons that I concurred in the appeal being dismissed with costs to Maples and Calder being fixed at $600.

GEORGES, J.A. :

Tower Corporation Limited (Tower) had at all material times been the registered owner of a parcel of land in the George Town Commercial Centre. In August, 1982, it entered into a contract with Hadsphaltic International Limited, (Hadsphaltic) to construct a multi-storey commercial building on the land. As part of the financing arrangement for this contract it charged the land in favour of Hadsphaltic to cover the construction costs. As events turned out, Tower defaulted in paying Hadsphaltic for the construction costs and Hadsphaltic put the property up for sale by auction. There were two bidders, the Government of the Cayman Islands and a subsidiary company formed by Hadsphaltic for the purpose of bidding at the auction. The Government of the Cayman Islands was the successful bidder with its bid of $4,650,000.00. Tower was of the view that that was a sum considerably less than the value of the property and filed an action against Hadsphaltic claiming damages for negligence. The particulars alleged failure to advertise the auction properly, as well as misfeasance in the actual conduct of the auction.

Maples and Calder, a firm of solicitors in the Caymans, had acted as solicitors for Hadsphaltic in relation to enforcing their rights under the charge. To safeguard themselves against any damage which they might have been called upon to pay to Tower, Hadsphaltic filed a separate action against Maples and Calder, alleging that the firm had been negligent in advising them on issues relating to the advertising of the auction and its conduct.

Since the two actions raised many common issues of fact, it was ordered that they should be tried together. The hearing begin in February, 1987. By the end of August, 1987, Tower had completed its case and Hadsphaltic had nearly completed its case, but by consent, it was agreed that one of its witnesses be interposed in the course of the

hearing of the case by Hadsphaltic against Maples and Calder. Maples and Calder had opened its case against Hadsphaltic and had called their first witness. At that stage the attorneys acting for Tower asked leave to withdraw from the case and were granted leave to do so on 31 August, 1987. Thereafter, Tower was no longer represented at the hearing, though officials and employees of the firm which acted as corporate secretary for Tower did attend daily.

Since Tower was no longer represented, attorneys for Hadsphaltic applied to have its case against them struck out. Attorneys for Maples and Calder resisted this application. The Chief Justice permitted them to do so, over-ruling the objections to their locus standi made by attorneys for Hadsphaltic. The Chief Justice refused the application and Hadsphaltic has appealed.

At the hearing of the appeal attorneys appeared for Maples and Calder and objection was also taken to their entitlement to be heard. Mr.Croxford pointed out that in Enoch v National Coal Board, [1978] 122 S.J. 401, a third party had not been permitted to make an application in a matter between the plaintiff and the defendant. The situation here was even stronger. The actions were separate actions being heard together, not a single action with a third party.

The application now being considered is an application in the very courseof the hearing. The order that the cases be tried together provided that Maples and Calder should be bound by the result of the case by Tower against Hadsphaltic. They must necessarily be affected by the outcome of that case.

Maples and Calder could not be found liable to Hadsphaltic unless it was established that Hadsphaltic was liable to Tower. To prove such liability, Tower had to establish that it suffered damage - that the building was sold at an under-value and that this was due to the negligence of Hadsphaltic. If negligence was proved but damages could not be shown, Tower would fail and Hadsphaltic's claim against Maples and Calder would fail. A finding that no damages had been proved could only be made in the case by Tower against Hadsphaltic.

If that case was struck out, it could be held that Maples and Calder had failed to meet professional standards in the advice which they gave on issues relating to the advertising of the auction and a declaration could be made that they were liable to indemnify Hadsphaltic against any liability which Tower might subsequently establish against it. Maples and Calder would have lost the benefit of the cases being heard together, moreso, since they had spent considerable time and effort towards establishing that Tower had not, in fact, suffered any damage.

Had the cases not been heard together, Hadsphaltic's case against Maples and Calder would have awaited the outcome of the action by Tower against Hadsphaltic. Had that case been struck out in the course of trial, Hadsphaltic would have been entitled, it is true, to pursue its claim against Maples and Calder for a declaration in relation to contingent liability and costs. In that event, however, the costs which would have been incurred by Maples and Calder would have been considerably less.

Maples and Calder were, therefore, vitally concerned that a decision on the merits be reached in the case by Tower against Hadsphaltic so that their liability to indemnify Hadsphaltic could be conclusively determined.

For these reasons I concurred in the ruling that Mr. Harvey be allowed to address us.

The basis of the application is section 58 of the Judicature Law, No. 11 of 1975. This reads in part:

> "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 ..."

Mr. Croxford for Hadsphaltic contends that Tower as a company could appear only by its legal representative, that its legal representative having withdrawn it no longer appeared that on the first day after the withdrawal of its legal representative Tower would have failed to appear on the case being called and, accordingly, the defendant company, Hadsphaltic, was entitled to have the case against them struck out.

Section 78 of the Judicature Law, substantially reproduces section 151 of The Judicature (Administration of Justice) Law of Jamaica, Cap. 74. It would have been part of the law of the Cayman Islands when the islands were administered as part of the then colony of Jamaica. This law governed the procedure in Resident Magistrates' Courts in Jamaica. Section 151 is itself patterned on section 88 of the County Courts Act, 1888. There is one difference. The provision that the case be stood down to the bottom of the list if the plaintiff did not appear when it was first called is an addition not found in section 88 of the County Courts Act. Circumstances in Jamaica then, no doubt, made this concession desirable.

The differences between the Judicature (Administration of Justice) Law and section 58 of the Judicature Law may properly be described as linguistic. The phrase, "or at any continuation or adjournment of the said Court" in the former Act becomes, "or upon any day thereafter to which the proceedings may be adjourned". I accept that this change involves nothing more than modernising the language and does not change the meaning.

It was Mr. Croxford's contention that these enactments did no more than restate a fundamental principle of the adversarial system of procedure in English justice lucidly described by Blackstone in his Commentaries, 7th Edition at pp 315 -

> "But here if it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the King's writ, it is necessary that both parties be

> kept or continued in court from day to day, till the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again ...
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> And, after issue or demurrer joined, as well as in some of the previous stages of the proceedings, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the continuance because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted the case is thereby discontinued and the defendant is discharged sine die, without a day, for this turn: for by his appearance in court he has obeyed the command of the King's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons but he must be warned afresh and the whole must begin again de novo".

It is common ground that the opening sentence of section 58 of the Judicature Law, No. 11 of 1975 is mandatory. Once the conditions therein set out are found to exist, the case must be struck out. The question for determination in this appeal is whether or not these conditions do exist.

Mr. Harvey contends that the mandatory provisions come into effect only if on day one of the trial when the case is called the plaintiff fails to appear. Mr. Croxford contends that the words in their literal meaning apply whenever the plaintiff fails to appear on any day when the case is called, no matter what stage of hearing the trial may have reached.

The corresponding section of the County Courts Act has been considered by the English courts. In Jordan v Jones and Another, (1880)

40 J.P 800, the plaintiff sued to recover a sum of money said to be due for work done and material supplied in the construction of water-works for which the defendants had contracted with a town corporation. The case came on for hearing on 16 December, 1879. Some of the plaintiff's evidence was taken and it was adjourned to 17 February, 1880 for the evidence of a certain engineer, employed by the corporation, to be taken. On the adjourned date neither the plaintiff nor the engineer, whose evidence was to be taken, appeared. Thereupon, the county court judge directed that judgment be entered for the defendants with costs. The plaintiff subsequently applied for a new trial and this was refused. The plaintiff then filed a motion to make a rule absolute, calling upon the judge to show cause why he should not hear and determine the plaint.

The Divisional Court, (Pollock, B. and Hawkins, J.) held that the trial judge should not have heard and determined the case on 17 February, by entering judgment for the defendant. He should have struck it out. Consequently, the plaintiff was entitled to a new trial.

Pollock, B., held that the circumstances fell within section 79 of the County Court Act, 1846, which read in terms similar to section 58 of the Judicature Law, 1975:

> "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 ..."

Hawkins, J., held that the judge did not have jurisdiction to hear and determine the cause on the day on which he did because the plaintiff had not been present.

Mr. Croxford stressed that this was a case in which the trial had actually begun. Evidence had been taken. Nonetheless, the issue being one of jurisdiction, the judge could not hear and determine the

matter on the adjourned day in the absence of the plaintiff. The language of the section was so close to that of the section to be construed that the reasoning should be found persuasive and should be adopted.

While the force of the argument is undoubted, it must be borne in mind that the Divisional Court was dealing with an inferior court of limited jurisdiction and not a court of unlimited jurisdiction such as the Grand Court. It is, perhaps, also of significance that the result achieved permitted the determination of the cause on its merits, a goal usually regarded as more likely to serve the ends of justice than its disposal on a ground of procedural technicality. Additionally, it is to be doubted whether the draftsman of the Judicature Act of 1975 was aware of Jordan v Jones, which appears to have been reported only in the Justice of the Peace Reports, and, nonetheless, decided to adopt that language.

Basic to the adversarial system as may be the presence of the plaintiff, convenience and logic do dictate that circumstances may exist in which a determination may be made in his absence.

Section 58 itself contains the following proviso:

> "Provided that if the plaintiff does not appear when called upon and the defendant appears and admits the cause of the action to the full amount claimed, and pays the fees payable in the first instance by the plaintiff, the court, if it thinks fit, may proceed to give judgment as if the plaintiff had appeared; or if the defendant does not pay the fees as aforesaid, but admits the cause of action to the full amount claimed or any part thereof, the Clerk of the Court shall make a note of such admission on the back of the summons, and at any time within twelve months thereafter, on the application of the plaintiff to the Clerk of Court and payment by the plaintiff of the necessary fees, the Clerk of Court shall enter judgment for the plaintiff for the amount admitted and costs, and the judgment so entered shall have the same force and effect as a judgment of the court".

Although the ultimate source of the section was section 88 of the County Courts Act, 1888, the Judicature Law, 1975 is modelled on the law in Jamaica which made provisions for Resident Magistrates' Courts. Not only is there the provision for placing the cause at the bottom of the list, but in the proviso there is provision for entering judgment within 12 months on a partial admission. The Jamaican Resident Magistrates' Law, 1904, section 28 made clear that the court did not require pleadings. There would be a written plaint. The defendant would be required to answer it orally when the case was called and thereupon:

> "the Resident Magistrate shall proceed in a summary way to try the Cause and shall give judgment without further pleading, or formal joinder of issue".

The qualification for being a judge of the Grand Court was that for being a Resident Magistrate in Jamaica and a Resident Magistrate in Jamaica and a Resident Magistrate, Jamaica could simultaneously hold office as a judge of the Grand Court in the Cayman Islands. In historical perspective, the enactment has been adopted from legislation intended for a court of limited jurisdiction summarily disposing of smaller claims.

In interpreting this section today it must be borne in mind that it is being applied to the Grand Court as it is now - a court of unlimited jurisdiction in which many complex matters are litigated, some at great length. The intention of imposing a broad fetter on the jurisdiction of such a court because of the absence of the plaintiff should not be perceived unless the language is so clear as to leave no sensible alternative.

I agree with the learned Chief Justice that the proviso to section 58 of the Judicature Law, 1975 contemplates a stage at which the actual hearing of the case has not yet begun. While it is possible that an admission from the defendant could come at any stage of the proceedings, in normal circumstances such an admission is far more

likely on the first day of the hearing when the defendant is called upon to answer the plaint. Clearly the proviso refers to the day as that same indicated in the opening sentence of the section to which it is attached.

Section 59 of the Judicature Law, 1975 reads:

> "If upon such day, the defendant does not appear or excuse his absence or neglects to answer when called in court, the court, upon proof to its satisfaction of the service of due notice on 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 only ..."

The use of the preposition "to" after "proceed" legitimately supports the inference of moving on to a stage not yet reached, viz. "the hearing of the trial". If the "hearing of the trial" had already been in train, the preposition "with" would be expected after "proceed". One would proceed with a hearing already begun and to a hearing not yet begun. The opening words of section 58 are "if upon such a day". This clearly refers to the day mentioned in section 58.

I am satisfied that section 58 should be interpreted so as to compel the mandatory striking out only if the plaintiff failed to appear on the first day the case is called or on any day to which the case is subsequently adjourned without the trial or hearing having actually been commenced.

Once the plaintiff has appeared and the case has begun, the mandatory opening sentence of section 58 would no longer apply. The plaintiff having appeared, the issue on any day thereafter would be whether he had made "proof of his demand" to the satisfaction of [the] court in which case it would be lawful for the court "to non-suit the plaintiff or to give judgment for the defendant". This is a matter fully in the discretion of the trial judge.

At the stage when the plaintiff failed to appear the case for the plaintiff had already been closed. Because of an accommodation granted to Hadsphaltic, its case had not yet been closed, one witness remaining to be called, and there were also the final addresses to be delivered. There was material upon which a decision on the merits could be given and the trial judge was plainly correct in exercising his discretion by continuing the hearing with the intention of doing this at the close of both cases.

Accordingly, I concurred in the decision that the appeal should be dismissed.

ROWE J.A.:

In the 7th Edition of Blackstone's Commentaries, 1775, pp. 35-36, there appears a classic passage describing th manner of procedure and the obligations of a plaintiff when a defendant is compelled to attend Court in a civil suit.

> "But here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in answer to the King's writ, it is necessary that both the parties be kept or 'continued' in court from day to day, till the final determination of the suit. For the court can determine nothing, unless the presence of both the parties, in person or by their attorneys, or upon

> "default of one of them, after his original appearance and a time pre-fixed for his appearance in court again. ...
>
> And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigencies of the case may require. The giving of this day is called the 'continuance' because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted the cause is thereby discontinued, and the defendant is discharged sine die, without a day, for this turn: for by his appearance in court he has obeyed the command of the King's writ; and unless he be adjourned over to a day certain, he is no longer bound to attend upon the summons but he must be warned afresh and the whole must begin de novo."

The appellant's counsel submitted that it is a fundamental principle of the adversary system of law that when a defendant comes unwillingly to Court in answer to a claim made by a plaintiff, the plaintiff must remain in Court from day to day to prosecute its claim and if the plaintiff fails so to do, the defendant is entitled to judgment, and he relied in a basic way upon the authority of Blackstone's Commentaries, quoted above. He developed his submissions by reference to English Statutes, the English High Court practice, the County Court Rules and Practice and to a number of decided cases, in an effort to find the true meaning of Sections 58 and 59 of the Judicature Law of the Cayman Islands.

Three sets of litigants in two connected suits had for their mutual convenience agreed that the two suits, although not consolidated should be heard together. These suits were: (a) No. 419/84 Tower Corporation vs. Hadsphaltic International Ltd., (b) No. 503/85 Hadsphaltic International Ltd. vs. Maples and Calder.

And the material terms on which it was agreed that the two cases be tried together were:

> "1. That each of the parties to Cause No. 419 of 1984 and Cause No. 503 of 1985 ('the two actions') do serve on the other parties to the two actions copies of all their pleadings and Further and Better Particulars filed in the two actions.
>
> 2. That in so far as they have not already done so each of the parties to the two actions do serve on the other parties to the two actions on or before 10th October, 1986 a list of documents and that there be mutual inspection of the documents on the said lists immediately thereafter.
>
> 3. That all evidence given at the concurrent trial of the two actions shall be evidence in both actions.
>
> 4. That Maples and Calder shall be bound by the result of Cause No. 419 of 1984.
>
> 5. That Tower Corporation Limited and Maples and Calder do mutually exchange their experts' reports on or before 7th November, 1986 and that Hadsphaltic International Limited and Maples and Calder do mutually exchange their experts' reports on or before 7th November, 1986.
>
> 6. That each of the three parties to the two actions do use their best endeavours to mutually exchange any supplemental experts' reports on or before 19th December, 1986.
>
> 7. That each of the parties to the two actions be at liberty to call expert witnesses limited to those witnesses the substance of whose evidence has been so disclosed as aforesaid and to 5 experts for each party.
>
> 8. That each of the three parties to the two actions be at liberty to cross-examine witnesses called by any other party to the two actions."

All parties were represented by counsel and the trial continued for ninety-eight days when on August 31, and September 1, 1987, counsel for the plaintiff/respondent Tower Corporation Ltd., failed to appear and subsequently formally withdrew from the case. Solicitors on the Record for the plaintiff/respondent by summons

applied for and was granted leave to have their their names removed from the Record. When that state of affairs became apparent the defendant/appellant applied to the Court to strike out the plaintiff/respondent's action in Suit No. 419/84 under the provisions of Section 58 of the Judicature Law, 1975. That section provides inter alia that:

> "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."

"Appearance" it was argued is a term of art which can only mean that the individual appearing before the Court has a right to represent the party and has a right of audience before the Court.

There is no provision in the Judicature Law, the Evidence Law or the Grand Court (Civil Procedure) Rules, as amended, which deals specifically with the manner in which a limited liability company may appear in the Grand Court. It is my view therefore, that the proviso to Rule 62(2) of the Grand Court (Civil Procedure) Rules as amended directs the Court in such circumstances to have resort to the applicable Rule of the High Court of Justice in the United Kingdom.

Rule 5/6/2 of the Supreme Court Practice, 1988 provides that:

> "Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor."

Similarly paragraph 4665 of the Supreme Court Practice, 1988, provides that:

> "A company cannot take part in any proceedings before the Court except by Counsel or (in Chambers) by a Solicitor. ....."

Mr. Harvey who intervened on behalf of Maples and Calder did argue, as a very remote alternative, that in the absence of binding authority in the Cayman Islands, it was open to the Court to find that "appear" in Section 58 in respect of a company could include an officer of the company physically attending Court as its representative, although that representative would have no right of audience. One ought not to give so strained an empty legalistic meaning to a term in ordinary usage in the law. What would be the practical purpose of having a limited liability company "appear" in a technical sense if its representative could not utter one word, present one document, take one objection and neither project nor protect its interests in any way. I think that the Rule contained in Rule 5/6/2 of the Supreme Court Practice 1988 should be fully applicable in the Cayman Islands and that the plaintiff/respondent can therefore only appear in Court by a person legally qualified to practice in the Grand Court.

The issue therefore is, if appearance in Section 58 of the Judicature Law, 1975, in the case of the plaintiff/respondent can only be by an attorney-at-Law qualified to practice in the Cayman Islands and on the 98th and 99th days of the trial, the plaintiff/respondent did not so appear, then is the defendant/appellant entitled to have the action struck out for want of prosecution. Before I attempt to answer this question, I must deal with another representational matter which was developed at some length. This concerned the decision of Summerfield C.J. to permit counsel for

Maples and Calder to intervene in the defendant/appellant's application to strike out the respondent's claim. The applicant argued that a third party had no locus standi to intervene in the action between the plaintiff and the defendant and in any event any interest that Maples and Calder could have in the action between the plaintiff and the defendant would be too remote in the circumstances and he relied upon the decision in Enoch v. National Coal Board (1978) 122 S.J. 401. Milmo J. held that there was no principle of law or justice upon which that third party could be allowed to prevent the plaintiff having the question of the liability of the defendant to him being determined by the Court.

The plaintiff had brought an action against the defendant for negligence and breach of duty. Nearly a year went by before the defendant filed its defence, but shortly after so doing it filed a third party notice claiming indemnity from the third party who entered appearance. Two years of total inactivity by all the parties went by. Then the third party tried to get the third party proceedings dismissed for want of prosecution. This was refused. The third party appealed and also issued a summons to dismiss the plaintiff's action against the defendant for want of prosecution. Nothing apart from the delay could be advanced by the third party for wishing to have the plaintiff's action dismissed. It was an application which was bound to fail because as the Court pointed out it did not necessarily follow that because the third party had a good defence against the defendant, the defendant must necessarily have a good defence against the plaintiff nor that if the plaintiff recovered against the defendant, the defendant would necessarily have to be indemnified by the third party.

The decision in this case is not authority for the very broad general submission made by counsel for the appellant. The Court recognized that there were circumstances which could probably warrant the third party's interference e.g. contumelious conduct by the plaintiff, or failure by the plaintiff to comply with a peremptory order of the Court. In the instant case there was a history of interlocutory applications, catalogued by counsel for Maples and Calder, and this history included extensive arguments concerning:

(a) privileged documents;

(b) interlocutory arguments as to whether privilege was waived by the plaintiff/respondent in relation to some expert reports;

(c) whether copies of the Cayman Islands Hansard were receivable in evidence.

In respect of all these interlocutory applications Maples and Calder, without objection from the applicant, made submissions to the Court.

Of even more cogent effect was the Consent Order of June 20, 1986 already quoted herein by virtue of which, not only were Maples and Calder served with all the relevant pleadings and documents in the suit between the plaintiff and the defendant, but it was agreed that the evidence given at the concurrent trial of the two actions should be the evidence in the two actions and that Maples and Calder would be bound by the result of the Cause No. 419/84, between the plaintiff and the defendant.

That agreement in my view removed the instant proceedings from considerations applicable to ordinary third party proceedings. Maples and Calder had agreed to be bound by the decision in the plaintiff/defendant action on condition that it could vigorously take part in every aspect of that case as if it had been a defendant

on the Record. The defendant had agreed to this interference by Maples and Calder in its action with the plaintiff/respondent presumably because they both had a common interest against the plaintiff. Whatever may have been the motivation for the Consent Order, there it was, and in my opinion it gave unreserved right to Maples and Calder to take part in all aspects of the concurrent trial.

The first portion of Section 58 of the Judicature Law, 1975 places a mandatory duty on the Court to strike out a plaintiff's case if certain pre-conditions exist. In the first place it must be upon the day upon which any action is set down for hearing before any Court; secondly upon any day thereafter to which the proceedings may be adjourned; thirdly in either case the plaintiff does not appear; fourthly the case must first be put at the foot of the list and lastly when reached the second time the plaintiff still does not appear.

Mr. Croxford submitted that the provisos of Section 58 of the Judicature Act, 1975 were in all material particulars identical with the County Court Act of 1888. He did admit, however, that the words "or at any continuation" found in the 1888 Act form no part of Section 58 of the Judicature Act. In my view the words "or at any continuation" had a special meaning in 1888 and followed exactly the principle adumbrated by Blackstone that a plaintiff was obliged to be in Court every-day of the trial or run the risk of his case being struck out. That they have been omitted from the Judicature Law, 1975 is of some significance as will appear later.

Jordon v. Jones and Another (1880) J.P. Reports was a case in which the plaintiff did not appear on an adjourned trial date and the County Court Judge entered judgment for the defendant. The plaintiff had no right of appeal and so the plaintiff sought to set aside the judgment on the ground of want of jurisdiction in the County Court Judge to enter judgment for the defendant. Pollack B & Hawkins J. held that under the County Court Act 1846, the County

Court Judge ought to have struck out the plaintiff's case, thereby giving him another opportunity to bring his action against the defendant.

From the perspective of the appellant this is an important decision as it related to a part-heard trial in contradistinction to a decision made on the first day set for trial.

Jennings and Wife v. The London General Omnibus Company (No. 2) (1871) XXX L.T. 610 was a case in which the plaintiff's attorney withdrew on the first day of trial in protest against what he considered to be a prejudical remark by the Judge in the face of the jury. The case could not have proceeded in any case as the principal witness for the plaintiff, his wife, was ill and unable to attend Court. The trial Judge refused the application for an adjournment and remarked: "No, I cannot assist you. If the Company insist upon it they have a right to costs; my experience of such cases sent down from the Superior Court, is, that they are brought for the purpose of picking the pockets of the omnibus company." Plaintiff's counsel felt aggrieved and voiced his dissatisfaction by indicating that the plaintiff was entitled to have his case heard by an impartial tribunal. The trial Judge protested his innocence, disclaiming any tinge of prejudice. Nevertheless, counsel and his client withdrew. The case was ordered struck out, and an application to the same judge on the following day to re-list was refused. When the case was taken to the Court of Exchequer, the Court held that if the plaintiff did not appear on the day appointed for hearing, unless the case was adjourned, the cause was at an end. There was nothing to re-list. This plaintiff was put in the same position as the plaintiff in Jordon v. Jones, that is to say, if he still wished to have redress, the course open to him was to bring a fresh action. Bramwell B. expessly left open the question of what

effect, if any, the first action would have upon a second action, if brought. What is clear, however, is that the Jennings case was disposed of on the first day set for hearing.

In Armour v. Bate (1891) 2 Q.B. 233, there was a claim and counter-claim in the High Court before Wills, J. and a jury. The plaintiff did not appear; the defendant abandoned his counter-claim and judgment was entered for the defendant. On appeal it was held that the proper order should have been one dismissing the action for want of appearance of the plaintiff at the trial, but Lord Esher M.R. thought that there was no difference in effect between a dismissal for want of appearance and a dismissal on the merits. He said: "The form [of the judgment] would be the same as that formerly in use in the Chancery Division, and its effect will be the same as if the action had been dismissed on the merits."

Armour v. Bate was referred to with approval in Re Edwards's Will Trusts, Edwards v. Edwards (1981) 2 All E.R. 941. It is to be recalled, however, that Armour v. Bate was decided under Order XXXVI., r. 32 of the Supreme Court Rules in force in 1891 which provided that:

> "If, when a trial is called on, the defendant appears and the plaintiff does not appear, and there is no counter-claim, the defendant is not entitled under Order XXXVI., r. 32, to have judgment entered for him, but judgment should be entered dismissing the action for default of appearance of the plaintiff."

That Order gave no indication of what is meant by "when a trial is called on." Mr. Croxford said no definition of that commonplace term was necessary as everyone is familiar with the practice where an officer of the Court must announce the case that is about to be heard and that that is when the case is "called on." On his submissions the case is called on day by day and therefore the decision in Armour v. Bate (supra) if applied to the instant case the plaintiff would not have appeared on the 98th day when the case was called on by the officer of the Court.

The decision in Armour v. Bate was considered by the High Court of Justice and the Court of Appeal in Trinidad and Tobago in Charles McEnearney & Co. Ltd. v. Swift (1970) 16 W.I.R. 387; (1971) 16 W.I.R. 391. There the plaintiff brought an action and the defendant counter-claimed. On the day of trial the plaintiff did not appear and the defendant did not pursue his counter-claim. It was ordered that the action be dismissed, the plaintiff having failed to appear. The relevant procedural rule in Trinidad and Tobago was said to be identical with the terms of Order 36 r. 32 of the Rules of the Supreme Court of England. The plaintiff brought a second action. To this the defendant pleaded res judicata and relied strongly upon the dicta of Lord Esher M.R. quoted earlier. Rees J. held, and in this he was upheld by the Court of Appeal, that the plea of res judicata failed. McShine C.J. said:

> "It must always be a question in each case whether the circumstances give rise to the plea of res judicata in the accurate sense and the courts must act always to ensure that there is a final determination of the matter on the merits and that substantial justice is done between the parties."

The Court in Trinidad and Tobago did much to clarify the distinction which must exist between a judgment given for one party on the merits of the case and a judgment based on the failure of one party to appear and prosecute his claim. But even then that Court was not called upon to construe a section identical with Section 58 of the Judicature Law of the Cayman Islands nor with a fact situation similar to the one existing in the instant case.

Mr. Croxford relied upon certain passages from Halsbury's Laws in support of his submissions that if the plaintiff fails to appear when the case is called on for trial it is obligatory on the trial Judge to dismiss the action in default of appearance. Paragraph 568 of Vol. 9 of the 4th Edition of Halsbury Laws which deals with the County Courts provide:

"568 Effect of non appearance of plaintiff.

If the plaintiff does not appear at the hearing of an action or matter, the proceedings must be struck out."

In the High Court the words used in the comparable rule is "If, when the trial of the action is called on" and this phrase is explained to mean, "generally at the sitting of the Court, or at any time during the day after an earlier case listed before it has been settled, or which was part-heard before it has been concluded." The significance of the case being "called on for trial" is that the case is then treated as having begun and thereafter it is subject to the Court's control and directions. See para. 509 of Hals. Laws 4th Ed. Vol. 37.

Mr. Harvey who was permitted by the Court to advance arguments on behalf of Maples and Calder in support of the decision of Summerfield C.J. contended that any similarity between the wording of the Cayman Statute - Section 58 of the Judicature Law, with the County Court Acts of England were fortuitous and that the true parentage of that provision was the Resident Magistrates' Law of Jamaica. The Cayman Islands Administration of Justice Act, 1894, (Cap. 493 of the Laws of Jamaica), provided in Section 85 that until other Rules were made by the Judge of the Grand Court, the rules and forms and practice for the time being in force relating to the Resident Magistrate's Courts in the Island (Jamaica) shall remain in force as applicable to the Grand Court.

Section 136 of that Law provided for summary trial in the Grand Court without pleading or formal joinder of issue. It was against that background that Section 137 provided a course of procedure if the plaintiff failed to appear at the trial. In 1894 Section 137 read in part:

> "137 - 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 put down to the bottom of the list of Causes for trial at that Court; and if on its being again reached the plaintiff shall not appear the Cause shall be struck out;"

This Section is identical with Section 187 of the Resident Magistrates' Law 1904 (Jamaica) and in the 1938 Revised Edition of the said Law, Section 190. Trial in the Resident Magistrate's Court in Jamaica was by summary procedure in 1894 and has continued to be so even today.

I think that if the historical derivation of Section 58 is material, it is derived from the Jamaican Statutes and not from the County Court Acts of England. By the Cayman Islands Government Law of 1893, the Jamaican Legislature exercised its powers to legislate for the Cayman Islands and one of the Laws so passed was the Cayman Islands Administration of Justice Law which modelled the Grand Court after the Resident Magistrate's Court in Jamaica. The qualification for a Judge of the Grand Court was the same as that for a Resident Magistrate in Jamaica and a person holding the Office of Resident Magistrate could concurrently hold the Office of Judge of the Grand Court.

Mr. Harvey is plainly right when he said that in 1894, the trial of a civil cause in the Grand Court would in all probability be concluded in a matter of minutes rather than hours. The summary nature of trials in the Resident Magistrate's Court and in the Grand Court, as first established, facilitated the rapid disposal of many small claims in a day where the accent was almost entirely concentrated on facts.

Section 58 appears to me to cover actions which have reached the trial stage for the first time. In the first place the cause is not to be peremptorily dismissed. It is to be put at the foot of the list. If for any reason time runs out before it is again reached then it would be adjourned to another sitting of the Court when the whole process would begin anew. If on any one day it is twice reached and on both occasions the plaintiff does not appear, then the presiding Judge or Magistrate must dismiss the cause for want of prosecution. There is no discretion in Judge or Magistrate to grant a further adjournment or to otherwise dispose of the case.

On the assumption that it was remotely possible that Section 58 could relate to any date apart from the first day of hearing, Mr. Harvey enumerated a series of circumstances in which he said it would be unjust for a case to be struck out after the trial had commenced and lasted through several days of hearing and therefore contended for a secondary construction of Section 58. He said a plaintiff anxious to conclude his case could for reasons beyond his control be prevented from attending Court on an adjourned day. On the case being called, if there was no other cause set for trial, the cause would have to be dismissed simply because the plaintiff had not appeared. It would avail him nothing to send counsel in on the following day to say that he and his counsel had had a motor vehicle accident on the way to Court and were not in a physical condition to send a message to the Court. It would not matter what was the stage of the case and what was the state of the evidence, a meritorious plaintiff would be driven from the judgment seat.

A plaintiff could shop for his forum. If he thought a Judge would be bound to decide against him on the evidence, then he could calculate his loss in costs thrown away as against the possibility of getting a more sympathetic Judge next time around and then absent himself from the Court. The Judge's hands would be tied. He would have no control over the action he had been spending weeks and months hearing, and would have to surrender to the machinations of

such a plaintiff. Any plaintiff could manipulate a trial and harrass a defendant, if indeed Section 58 of the Judicature Act on its true construction applied not only to the first trial day but to any succeeding trial day. This possible scenario led Mr. Harvey to submit that as the objective of the statute is to produce justice between the parties on procedural matters, if there was any ambiguity in the language of Section 58, then a secondary ordinary meaning should be given to the language of Section 58 in order not to put a burden on the Court to be forever trying over and over the same case and also not to inconvenience other litigants who were waiting for their cases to be heard.

Lord Simon re-stated the golden rule of construction in Maunsell v. Olins and Another (1975) A.C. 373 at pp. 390-91:

> "1. The 'golden' rule of construction
>
> What Maxwell on Interpretation of Statutes, 12th ed. (1969), p. 28, calls 'the first and most elementary rule of construction'
>
> > 'is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning.'
>
> This 'golden' canon of construction has been so frequently and authoritatively stated that further citation would be otiose. It is sometimes put that, in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction, or fulfil the purpose of the statute: while, in statutes dealing with technical matters, words which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified, some secondary meaning as terms of art).
>
> .....

> "It is essential that this'golden' rule is adhered to. An English court of construction must put itself in the place of the drafts-man, and ascertain the meaning of the words used in the light of all the circumstances known by the draftsman - especially the 'mischief' which is the subject matter of the statutory remedy."

In my opinion there is no ambiguity in the language of Section 58 if one concentrates upon the salient fact that its provisions were developed for a summary Court which was intended to dispose of a multiplicity of cases on any given day. And if there were such an ambiguity, Mr. Harvey has convinced me that it would be unjust to adopt the construction contended for by the appellant viz., that the section applies to any day of trial subsequent to the first day.

Because in my opinion Section 58 has no application to the circumstances of the instant case, one must look to see if there are any other statutory provisions upon which reliance may be placed, to aid the appellant. Rule 62(2) to which I have earlier referred states that where there is no local rule of practice and procedure, the practice and procedure in a like proceeding in the High Court of Justice in the United Kingdom shall be followed. The appellant therefore relied upon Order 35 of the Supreme Court Practice 1985 which states:

> "1. (1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a Judge.
>
> (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 counter-claim in the absence of that party."

Mr. Croxford argued that Order 35 of the 1985 Supreme Court Practice is taken from the former Order 36 r. 32. The Supreme Court Practice of 1985, he said, is a consolidating statute and there is a presumption that the consolidating statute does not effect a change in the law. Order 36 r. 32 stated:

> "If when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim shall be entitled to judgment dismissing the action but if he has a counter-claim, then he may prove such counter-claim so far as the burden of proof lies open to him."

The note to Order 35/1 states expressly that the effect of the rule is that "if the plaintiff does not appear, but the defendant does appear at the trial, the defendant is entitled to judgment dismissing the claim. ..."

The controversy as to whether "may" in Order 35/1 is mandatory or directory is of little assistance in determining whether that Order applies to the first day of trial only or to any stage of the trial. "May" is defined in para. 4603 of Vol. 2 of the Supreme Court Practice 1985, to mean "may" or "may not":

> "In all the Rules the word 'may' has been held to mean 'may or may not.' This gives the Court a discretion, and no rule of practice can take it away (Att.-Gen. v. Emerson (1890)24 Q.B.D. 56). The use of the word 'may' in the rules is deliberately permissive (see per Cohen L.J. in Nagy v. Co-operative Press Ltd. [1949] 2 K.B. 188, p. 193 following Morse v. Frost [1927] 1 K.B. 231 C.A.).
>
> But as to whether there is a duty to exercise the power depends on the context."

I am of the opinion that Order 35/1 would operate on the first day of a trial to entitle the defendant to a judgment dismissing the plaintiff's case if the plaintiff failed to appear and that the statutory conditions for the dismissal having been fulfilled there would be no discretion in the Judge to refuse to dismiss the action.

I observe that in setting out the scope of Order 35/1, the editor refers to the fact that the former Order 36 r. 38 which entitled the trial Judge to disallow vexatious or irrelevant questions to be put in cross-examination has been omitted, presumably because no rule is necessary to confer this power on the Judge who has control of the proceedings at the trial. This comment strengthens the arguments (against the position taken by the appellant) that once a trial has commenced it becomes subject to the Court's control and directions and different considerations apply from those which would be appropriate at the very commencement of the trial.

Summerfield C.J. was in my opinion correct when he said that Order 35 applied only when the case is called on for hearing for the first time. This therefore means that neither in the Laws of the Cayman Islands nor in the Rules of the High Court of Justice in the United Kingdom is there a specific rule of procedure determining the course which a trial Judge ought to take when during the course of a trial a plaintiff fails to appear. It must therefore be in the discretion of the trial Judge to determine the course which would ensure the greatest measure of justice to all the parties. Summerfield C.J. had heard the whole of the plaintiff's case, the whole of the case for the appellant except for one witness whose evidence had been reserved by consent of the parties, and the whole of the evidence for Maples and Calder, at the time when the plaintiff failed to appear. It would be an injustice to the plaintiff and to Maples and Calder if, on the application of the appellant, the plaintiff's action was then struck out, leaving the possibility of a fresh action and the con-committant costs and trouble of the parties to defend such an action.

It was for these reasons that I concurred with my brothers that the appeal should be dismissed and that the appellant should pay the costs of Maples and Calder fixed at C.I.$600.00.