Date:19990709
C.A. 150193

NOVA SCOTIA COURT OF APPEAL

Cite as: Moore v. Economical Mutual Insurance Company, 1999 NSCA 91
Roscoe, Hallett and Cromwell, JJ.A.

BETWEEN:

DOUGLAS MOORE and JUDITH LAVENDER	)	Martin C. Dumke,
	)	Suzanne Jensen and
	)	Shawn M. O'Hara
Appellants	)	for the appellants
	)	
- and -	)	
	)	
ECONOMICAL MUTUAL INSURANCE COMPANY, a body corporate	)	David A. Miller, Q.C. and
	)	Nancy I. Murray
	)	for the respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal heard:
	)	June 17, 1999
	)	
	)	Judgment delivered:
	)	July 9, 1999
	)	
	)	

THE COURT: Appeal dismissed with costs fixed at $3,500 plus disbursements per reasons for judgment of Cromwell, J.A.; Hallett, J.A. concurring and Roscoe, J.A. concurring by separate reasons.

ROSCOE, J.A.:

[1] This is an appeal from a decision of Justice Hiram Carver of the Supreme Court, rendered after a 13 day trial of an action by the appellants against the respondent claiming indemnification under a fire insurance policy. Justice Carver dismissed the appellants' claim after finding that the appellants, or someone else at their direction, set the fire and that the appellants committed fraud in the swearing of the proof of loss declaration.

[2] Although in the Notice of Appeal, the appellants list 13 grounds of appeal, they have elected, in their written and oral argument, to primarily address their position that they did not receive a fair trial because the trial judge refused to grant their request for an adjournment of the trial which then proceeded with the appellants not represented by counsel. The appellants also seek to have three affidavits admitted as new evidence pursuant to **Civil Procedure Rule** 62.22(1) on the basis that it is in the interests of justice to allow them the opportunity to provide further explanation as to why the appellants were without counsel on the opening of the trial, and to indicate the nature of the evidence that would have been presented at the trial if the appellants had either been represented by counsel or known how to compel attendance of witnesses.

[3] The respondent submits that the review of the trial judge's decision not to grant the adjournment and the consideration of the application to admit new evidence must be undertaken in the context of the entire proceeding, taking into account the numerous findings of fact and credibility made by the trial judge.

[4] The trial, originally expected to require nine days, had been scheduled to begin on

April 28, 1998. As a result of the appellants' counsel filing a Notice of Trial, the dates had been assigned in September 1997. The appellants had been represented by Mr. Kenneth Thomas from shortly after the fire until April 9, 1998. On that date, according to an affidavit sworn by Mr. Thomas in support of his application to withdraw as counsel, the appellant Moore informed Mr. Thomas that he had retained Mr. J.D.F. Theakston to represent him. Later on April 9th, Mr. Thomas received a fax from Mr. Theakston in which he indicated that he had been asked to "carry the file involving the fire insurance claim" and that he wished to obtain the file. At a pre-trial conference on April 9, 1998 Mr. Thomas advised the trial judge and counsel for the respondent that he had been replaced by Mr. Theakston. Most of the appellants' file was delivered to Mr. Theakston later on the same day. On April 14th Mr. Theakston advised Mr. Thomas that he would not act for the appellants at the trial. On April 15th Mr. Thomas advised the appellant Moore that he was not prepared to act for the appellants citing an "obvious lack of confidence between us." On April 17th Mr. Thomas was removed as counsel of record by order of a Chambers judge.

[5] On the opening day of the trial the appellant Moore asked Justice Carver to adjourn the trial so that he could retain new counsel. He indicated that he had an appointment to see Mr. Ferrier on May 4th. Mr. Thomas was present as a courtesy to the court to explain his position if necessary. Mr. Theakston was not present but provided the appellant Moore with an affidavit in which he deposed that he had never been retained by the appellants. He indicated that he had only perused the file in order to consider whether he could take on the matter but realized after a few days that it would not be "fair" to Mr. Moore for him to become involved at that late date.

[6] After submissions by respondent's counsel, Justice Carver asked the appellant Moore why he had discharged Mr. Thomas a few days before the trial. He responded:

> He was asking for a considerable retainer which I didn't have at that time to continue preparing the case to court. I couldn't come up with the money.

[7] Justice Carver asked Mr. Thomas to address that comment and he replied that he appreciated his position as an officer of the court and his obligation to carry the matter forward "notwithstanding any financial considerations". The respondent vigorously opposed the adjournment referring to the significant lapse of time since the fire, the further lengthy delay that would result in order to obtain another nine days of court time, and that since the defendant had the burden of proving fraud and/or arson, further delay and its effect on the memories of the insurer's witnesses, would seriously prejudice their defence.

[8] I agree with the submission of the respondent that this Court's review of the exercise of discretion by the trial judge in refusing to grant the adjournment should be undertaken in the context of the whole proceeding. (See **Webber v. Canada Permanent Trust Company and Long** (1976), 18 N.S.R. (2d) 631 (A.D.) and **Allen v. Stone** (1996), 146 Nfld. & P.E.I.R. 308 (Nfld.C.A.))

[9] The appellant Moore acquired the property in the rural area of Newburn, Lunenburg County by quit claim deed from heirs of an estate in April 1982. The house was very old, had been vacant for several years and did not have indoor plumbing or electricity. Sometime later Moore placed the property in the name of his girlfriend, the appellant

Lavender. In August 1992 an electrician was hired to install 100 amp electrical service and two electric heaters. In February 1993 the appellant Moore first obtained fire insurance with the respondent through the agency of Penny's in Bridgewater. He arranged for a replacement cost policy which insured the house for $100,000, personal property for $70,000 and out buildings for $10,000.

[10] On Friday evening, July 16, 1993, the appellant Moore left the property and travelled to Brooklyn, Queens County to spend the weekend with the appellant Lavender in her house. On Monday morning, July 20th, he returned to the property at Newburn which had been completely destroyed by a fire which was still smoldering.

[11] The trial judge properly instructed himself with respect to the burden of proof in fire insurance arson cases by referring to **Lewis v. Royal Insurance Company of Canada** (1990), 94 N.S.R. (2d) 166, affirmed on appeal (1990), 99 N.S.R. (2d) 421 and the cases referred to therein including **Hanes v. Wawanesa Mutual Insurance Co.**, [1963] S.C.R. 154. He concluded that portion of the decision as follows (page 31):

> Where the defendant is alleging arson and fraud, the burden upon it in both is to prove its case to a strong probability.
>
> The elements of a civil arson case require cogent evidence of method - evidence establishing that the fire was incendiary or deliberately set; motive - that is, that the plaintiff had a motive to set the fire; and opportunity - that is, was there opportunity on the part of the plaintiff, or someone directed by the plaintiff, to set the fire.

[12] Justice Carver ruled out all possible accidental causes for the fire and furthermore that despite Mr. Moore's allegation, none of the appellants' neighbours had anything to do

with the fire. He also concluded that Mr. Moore had opportunity coupled with other inculpatory evidence. (See **Rizzo v. Hanover Insurance Co.** (1993), 14 O.R. (3d) 98 (A.C.)) The motive for the fire was found to be to replace the old dilapidated house with a new structure.

[13] The trial judge, in his decision, made a series of critical findings of fact for which, in my opinion, there was an abundance of evidence which if accepted, would support a finding that the appellant Moore was responsible for the fire and perpetrated fraud in the sworn proof of loss. A few of the many conclusive findings which illustrate the extent of the appellant Moore's deceit and his advance preparation for the fire are:

1. The appellant Moore testified on direct that he did not go to MacDonald Chisholm, the agents for his vehicle insurance, for the fire insurance because he did not know they sold fire insurance. However, defence witnesses from that agency testified that he had applied through them for fire insurance but was turned down.

2. The appellant Moore removed a wood stove and a refrigerator from the property and stored them elsewhere. Then shortly before the fire he obtained an electric stove and fridge from a junkyard which he placed in the property. The Schedule of Loss filed by the appellants claimed a frost free refrigerator purchased new at a price of $1, 300 from a store described as Factory Clearance Outlet. Mr. Moore testified that he purchased the fridge between 1987 and 1992, but he did not know where that store was located. The remains of a refrigerator found in the fire contained a Westinghouse tag and a compressor. Evidence led by the respondent revealed that the refrigerator found in the debris had to be

at least 16 years old.

3. The appellant Moore removed the personal clothing and effects of the appellant Lavender from the premises shortly before the fire.

4. Several vehicles, a travel trailer, a gas tank, and a steel shed were not damaged in the fire because they were approximately 150 feet from the house. Moore testified that these items had always been at that location. He did not know about photographs taken by a neighbour a year before the fire which depict the placement of these items adjacent to the house.

5. Sketches for a new house to be built on the property were attached to a building permit approved on August 9, 1993. The electrician who installed temporary power for new construction, by permit dated July 22, 1993, thought that he had seen the plans on that date, three days after the fire.

6. Important documents, Mr. Moore's photo album and his motorbike were all at the appellant Lavender's home at the time of the fire.

7. Mr. Moore's hunting rifles were stored in the steel shed.

[14] The inescapable conclusion, as stated by the trial judge was:

> . . . A rather fascinating aspect of this case is the extent to which opportunity arises in the evidence concerning getting ready for the fire, obtaining electric heat, the storage of a stove and a refrigerator at the blacksmith shop, the obtaining of the discarded fridge and stove with no explanation at trial as to their whereabouts, the obtaining house insurance on a replacement basis, the removing of property of Ms. Lavender just before the fire, the positioning of the trailer, the shed, the cars and the gas tank a safe distance from the fire, sketches for the new home appearing in some detail so shortly after the fire and the fact that all his deeds and insurance papers, his photo album and his motorbike were safely lodged at Ms. Lavender's home. I was also very concerned where he was such an avid hunter why he would have his good guns stored in an unheated shed in the dampness which could cause rust to metal rather than having them in his home where it should have been dry. His explanation he didn't have them in the house because he had no secure place to house them did not ring with any degree of truth. **On all the evidence, I was satisfied Mr. Moore was**

methodically getting ready for the fire.

(emphasis added)

[15] The trial judge summarized his findings of credibility in the following passage:

> Mr. Moore has brought his credibility into question with his prior application for fire insurance with MacDonald Chisholm; in his application to Economical Mutual Insurance Company; with respect to the locking mechanism on the house at the time of the fire; over the use of the north end of the house; over obtaining the discarded fridge and stove; over not having the building and cars up around his house; over his comment to his daughter, Tammy Corkum; over the contents of the house which he has claimed, but his claim of $10,000 to replace the privy has shaken his credibility to the point I could not accept any of his evidence re his claim in this matter.

[16] Earlier in the decision the trial judge described the claim for replacement of the outbuilding:

> I find the claim of Mr. Moore in the Proof of Loss for the detached private structure had not been built by him prior to the fire at a cost of $10,000, or at all. The building he was replacing had been a privy that appeared to be there for some considerable time. This would not have been brought to light had it not been for a photograph being Ex.No.44 taken by Mr. Bezanson in 1992. This building is nothing more than an outhouse so prevalent at county homes one can take judicial notice of the fact. When Mr. Moore was confronted with this picture after he had described in detail the old structure, he had no real explanation.

[17] With respect to the claim for loss of personal effects, Justice Carver concluded:

> I was not satisfied the items the plaintiffs swore to in the Schedule of Loss were in fact in the house. I find from all the evidence there were little furnishings in the house before the fire and certainly nowhere near what was claimed. The amount of personal attire claimed was not believable. When Mr. Moore could not remember where he bought the big ticket items it gave the court cause for serious concern.

[18] The parts of the claim that would fall into the category of unbelievable would include the 66 pairs of footwear, and those items containing metal for which no debris was evident in the ruins including an Electrolux vacuum cleaner, a Lazyboy recliner and 60 feet of steel clothesline.

[19] As noted most recently by this Court in **Tait v. Royal Insurance Company of Canada**, [1999] N.S.J. No. 164 (Q.L.), the circumstances where this Court would interfere with findings of fact and credibility are exceptional:

> [para20] These findings of the trial judge are findings of fact based on the totality of the evidence, and based, partly, on findings of credibility. The reluctance of this Court to interfere with such findings, and the standard by which this Court would interfere with such findings, has been repeatedly stated. This Court will not interfere with the trial judge's conclusions on matters of fact unless there is palpable or overriding error, or unless the trial judge has ignored conclusive or relevant evidence, has misunderstood the evidence or has drawn erroneous conclusions from it. Nor does the Court of Appeal interfere merely because it takes a different view of the evidence. The findings of fact and the drawing of evidentiary conclusions from the facts is the province of the trial judge, not the Court of Appeal. See **Toneguzzo-Norvell (Guardian Ad Litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 (S.C.C.); **Travellers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434 (N.S.C.A.); **Parsons v. Parker** (1997), 160 N.S.R. (2d) 321 (N.S.C.A.).

[20] In the context of this entire proceeding, in retrospect, should this Court interfere with the trial judge's order not to grant the adjournment to the appellants on the opening of the trial? The standard of review of a decision on an application by a party for an adjournment is as noted in **Webber v. Canada Permanent, supra**:

> The conduct of a trial, including the granting or the refusal of adjournments, is within the discretion of the trial judge. An appeal court will not interfere with the exercise of that discretion unless it has been exercised on a wrong principle or great injustice has occurred.

[21] Here Justice Carver found that there were no exceptional circumstances which convinced him to grant the adjournment. There is, in my opinion, no reliance on a wrong principle apparent on the record. I do not accept that it was wrong for the trial judge to have asked Mr. Moore why he fired his lawyer just days before the trial, since that is the event which led to the request for the adjournment. Although counsel for the appellants on appeal strongly suggests that Mr. Theakston is the one who caused the problem, Mr. Moore was

not blaming him. He was not asking for more time so that Mr. Theakston could prepare for trial or insinuating that Mr. Theakston had improperly withdrawn from the matter; nor do I accept that it was an error of principle for the trial judge to be concerned about the effect of an adjournment on the respondent and the court's resources. The following comments from **Tait, *supra*** are applicable:

> . . . It is obvious that the trial involved great expense to the insurer. The insurer had nothing to do with the problem that arose, during the trial, between the appellant and his counsel. The insurer's rights have to be taken into account here. A new trial would be dealing with a matter which happened 15 years ago. There would be additional great cost and inconvenience to the insurer, to say nothing about the costs and inconvenience to the court system. Cogent reasons would have to be advanced to warrant such a retrial, and such reasons have not been advanced by the appellant.

[22] The appellants submit the great injustice that has occurred here is that they did not have the opportunity to present all the evidence that would have been called if they had been represented by counsel. It is argued that the whole of the transcript is tainted as a result of the appellants not being represented by counsel, and that Mr. Moore's credibility would have been protected by the presence of counsel and proper pre-trial preparation. In that regard the affidavits of the appellant Moore, his brother-in-law William Mansfield and his friend and neighbour, John Baker are presented as new evidence on the appeal.

[23] The test for the admission of the new evidence is set out in **Thies v. Thies** (1992), 110 N.S.R. (2d) 177; 299 A.P.R. 177, where Freeman, J. A. noted:

> The tests for admission of fresh evidence on appeals was set out by McIntyre, J., writing for the Supreme Court of Canada in **R. v. Palmer** (1979), 30 N.R. 181; 50 C.C.C. (2d) 193 (S.C.C.):
>
> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .

> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[24] Assuming without deciding that these affidavits meet the first three parts of this test, the affidavits, even if believed, could not, in my opinion, reasonably when taken with the other evidence adduced at trial, be expected to have affected the result of the trial; nor is there any information contained in the affidavits which is relevant to the decision on the adjournment application. As pointed out by the respondent, in several respects the Baker affidavit contradicts evidence given at trial by the appellant Moore. For example, he swears that he was present when the privy was torn down in the fall of 1992, and that he observed the new larger building with windows constructed on that site. However, Mr. Moore testified that a contractor built the new outbuilding in 1989 or 1990, but when faced with the Bezanson photograph on cross-examination he admitted that the tiny, windowless, weather-beaten privy shown in the photo is the one for which he claimed $10,000. The fraud in respect to the claim for the loss of the privy is admitted in the following excerpts from the cross-examination of Mr. Moore in which he is shown the Bezanson photograph:

> **Q.** What was that?
>
> **A.** The, it's an outbuilding.
>
> **Q.** That's the $10,000 outbuilding, isn't it, Mr. Moore?
>
> Mr. Moore, that's what you're asking the Economical Insurance Company to pay you $10,000 for, isn't it?
>
> **A**. Yes.

Q. Yeah. Mr. Moore, you know perfectly well that that structure does not, would not by the wildest stretch of the imagination cost $10,000 to restore?
Mr. Moore?

A. Yes.

Q. Yeah. You saw the policy coverage of $10,000 outbuilding, you thought "I had a privy. Here's a chance to pick up Ten Thousand bucks. Im going to put in a claim." That's what you did isn't it?

Mr. Moore?

A. Yes.

. . .

Q. Yeah. Now, Mr. Moore, you're well aware, Im sure you're well aware, if we didn't have this photo, hadn't produced this photo, nobody here would be any the wiser about this privy would they? Right?

A. Yes.

Q. Yeah. You've had pulled a fast one on the Economical Mutual Insurance Company?

Right?

Mr. Moore?

A. No, its not quite as I remember it.

. . .

Q. No. Mr. Moore, what you were trying to do, you were trying to pull a fast one on the Economical Insurance Company which you would have got away with if this photo didn't exist?

Right?

A. Yes.

[25] The photograph is fatal to the appellants' claim and the propriety of its admission into evidence is not questioned on the appeal.

[26] Parts of the Moore affidavit contradict submissions he made at the trial, for instance, with respect to whether the appellant Lavender would testify and when he had possession

of Mr. Thomas' file.

[27] The Mansfield affidavit, which simply states that he observed a fire in the general vicinity of Moore's house at 1:00 a.m. on the day of the fire, does not diminish the evidence relied upon by the trial judge to establish opportunity or add anything to the appellants' case.

[28] Considering the criteria for the admission of new evidence set forth in the **Palmer, supra**, decision, I am of the view that the new evidence should not be received because it is evidence that, taken with the evidence adduced before Justice Carver, could not be expected to have affected the decision.

[29] The decision on the adjournment application was within the discretion of the trial judge and it appears, on review, that the discretion was exercised judicially. There was no error in law in the denial of the adjournment. Although it may have been more procedurally fair in the circumstances at that time, to have permitted a brief postponement to determine if other counsel might have been available, in the context of this entire case, I have concluded that there was no substantive wrong or grave injustice. I am satisfied that, in the end, the results would not have been different if the appellants had been granted the adjournment. The evidence of fraud and deliberate dishonesty in this case are so overwhelming that it is impossible to understand how either more time or the assistance of counsel would have affected the result.

[30] In conclusion, I have carefully reviewed the evidence, the grounds of appeal, and the written and oral submissions of counsel. In my opinion, the trial judge did not exercise his discretion in a manner which would entitle this Court to intervene, nor did he misconstrue the facts or err in law. The appellants have not persuaded me that the trial judge acted upon any wrong principle or disregarded any material evidence. The findings of fact and credibility are amply supported by the evidence. I would therefore dismiss the appeal with costs in the amount of $3,500, plus disbursements.

Roscoe, J.A.

CROMWELL, J.A.:

[31] I agree that this appeal should be dismissed with costs. I reach that conclusion for somewhat different reasons than those of Roscoe, J.A. so I will briefly set out my own reasons. Roscoe, J.A. has set out the facts and I will only add a few factual points particularly relevant to my conclusions.

[32] I agree with Roscoe, J.A. that appellate review of the trial judge's decision not to grant the adjournment sought at the opening of trial should be undertaken in the context of the whole proceeding. I think, however, that the starting point for consideration of the case is a search for error in the decision of the trial judge with respect to the adjournment. If error is found, the question of its effect on the proceedings arises and must be answered

in light of the whole proceeding. The first question, then, is whether the trial judge erred in refusing the adjournment.

[33] The decision to grant or refuse an adjournment is within the discretion of the presiding judge. It is a discretion which the judge is particularly well placed to exercise. An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice.

[34] The appellants were left without counsel on the eve of trial. They decided to change counsel roughly 3 weeks earlier. They thought that they had obtained the services of new counsel to take the matter to trial. Their former counsel thought so too, even after he had a two hour meeting with new counsel. The trial judge was advised of the change of counsel at a pre-trial conference. New counsel subsequently advised that he would not act and stated in an affidavit that he had only ever agreed to review the matter. After this surprising turn of events, former counsel did some trial preparation, then advised that he would not act further. All of this to say that this was not a situation in which the plaintiffs were manipulating the process for the purposes of delay. While their decision to change counsel so close to trial was risky and unwise, it is clear that they and their former counsel thought there was a firm arrangement in place with new counsel before they discharged former counsel. The trial judge appears to have accepted as a fact that the plaintiffs thought they had new counsel before they discharged their former counsel and this finding is supported by the submissions made to the trial judge by their former counsel.

[35] There are many considerations relevant to the granting or refusing of an adjournment, but they all flow from one principle. I would adopt the following statement of the British Columbia Court of Appeal in **Sidoroff v. Joe** (1992), 76 B.C.L.R. (2d) 82 at p. 84 which I think succinctly and accurately summarizes it:

> ..... The settled principle is that the interests of justice must govern whether to grant an adjournment. The interests of justice always require a balancing of interests of the plaintiff and the defendant. (emphasis added)

[36] Where the effect of refusing an adjournment is to force the party seeking the adjournment to proceed without counsel, the required balancing must have due regard to the importance of legal representation. While the principles set out by Hallett, J.A. for the Court in **R. v. Beals** (1993), 126 N.S.R. (2d) 131 were developed in the different context of a criminal case, I think several of them are highly relevant in civil matters. There is certainly no absolute right to counsel in civil cases and efforts to retain and instruct counsel must be exercised honestly and diligently and not for the purposes of delay. The impact of the refusal of an adjournment on the fairness of the trial must also be considered having regard, for example, to the complexity of the issues raised.

[37] In this case, I think the trial judge applied wrong principles in refusing the adjournment. He did not balance the respective interests of the parties as they related to the interests of justice in securing a fair trial on the merits of the case. He did not give sufficient weight to the impact of forcing the plaintiffs to trial without counsel, particularly where he apparently did not think that the plaintiffs had attempted to use their retention of counsel for the purposes of delay. He accepted that the plaintiffs thought that they had

arranged new counsel but that new counsel then declined to act, therefore leaving them without counsel. With respect, the learned trial judge appears to have given more weight to inconvenience to the Court and counsel for the respondent than to the serious disadvantage of forcing the appellants to trial without counsel in circumstances in which the absence of counsel was not entirely their fault and was not an apparent attempt to delay the proceedings. As plaintiffs in an action on an insurance policy, they had little, if anything, to gain from delay in any case.

[38] I also think that the learned trial judge ought to have considered whether any prejudice to the respondent caused by granting the adjournment could have been compensated by the imposition of costs or other terms in granting it. The learned trial judge's reasons for denying the adjournment do not indicate that he considered this aspect. There was no evidence before the judge of any prejudice to the respondent which could match the obvious disadvantage of forcing the appellants on for trial without counsel in what was expected to be a two week trial involving allegations of arson and fraud. There was certainly no evidence that the inconvenience and costs thrown away that would have resulted from the granting of an adjournment could not have been compensated for in costs.

[39] I conclude, therefore, that this is one of those rare cases in which appellate intervention is appropriate because the learned trial judge did not apply proper principles in deciding whether or not to grant the adjournment.

[40] The next question is what order should this Court make having found an error.

[41] The **Rules** give the Court considerable discretion with respect to the disposition of appeals. The powers of the Court of Appeal under Rule 62.23 are extremely broad and have been interpreted to permit the Court to decline to order a new trial where the error did not give rise to any substantial injustice: see **Ratto v. Rainbow Realty** (1985), 68 N.S.R. (2d) 34 (N.S.S.C.A.D.) at paras. 13 - 20; see also **Judicature Act**, R.S.N.S. 1989, c. 240 as amended, s. 38(3). The rules or relevant statutes in some jurisdictions explicitly direct that a new trial should not be ordered unless some substantial wrong or miscarriage of justice has occurred: see for example the **Ontario Courts of Justice Act**, R.S.O. 1990, c. C-43 as amended, s. 134(6). While there is no similar explicit direction to this effect in our **Rules** or **Judicature Act**, this Court has the same authority as part of its broad discretion with respect to the disposition of appeals under Rule 62.23 and s. 38(3). It is in this way that, in my opinion, the Court is entitled to review the decision to refuse the adjournment in the context of the whole proceeding. The Court may examine the trial record (and, in appropriate circumstances, new evidence on appeal) to determine whether, notwithstanding the error, the Court is persuaded that a new trial should not be ordered.

[42] In a case like this one, I think this is a jurisdiction that should be used very sparingly. As a result of the error, the appellants were forced to trial without counsel. It is difficult and may be dangerous to speculate about the impact on the course of the trial that absence of counsel may have had: for a similar concern in the context of legal advice

upon arrest, see **R. v. Bartle**, [1994] 3 S.C.R. 173 at 216 - 217. Where, as here, there is substantial concern that, as a result of the error, the validity of the trial process itself may be brought into question, the Court should only dismiss the appeal having determined that an error was made if thoroughly persuaded that the interests of justice do not require a new trial.

[43] While not expressed in exactly these terms, a similar approach has been applied in the case of misdirection of a civil jury: see, for example, **Leslie v. The Canadian Press**, [1956] S.C.R. 871 at 874, and in cases involving denial of adjournments: see, for example, **Webber v. Canada Permanent Trust Co. and Long** (1976), 18 N.S.R. (2d) 631 (S.C.A.D.). The Court in the **Webber** case was obviously concerned that the adjournment ought to have been granted, although it stopped short of so holding. The Court nonetheless dismissed the appeal because it was "... satisfied that the appellant's claim was unsustainable in law so that no injustice will be done if the case is not re-opened..." and that the legal issue raised was "..conclusively settled." (at 636). Similarly, in **Fairn v. Fairn** (1976), 18 N.S.R. (2d) 282 (S.C.A.D.) at 285, the Court held that it did not have to decide whether the adjournment had been wrongly denied because it had not been shown that "...any evidence [which] might have been presented on any adjourned trial ... would have materially influenced the judgment appealed from...". (at 285) . In my view, once an error is detected at trial, the question is whether the Court is, nonetheless, persuaded that the interests of justice do not require a new trial.

[44] In my opinion, the denial of the adjournment in this case did not occasion any substantial injustice and it would be contrary to the interests of justice to order a new trial. The appellant Moore admitted that the proof of loss which the plaintiffs submitted was an attempt to defraud (or as it was put in evidence, “to pull a fast one”) on the respondent. The admission is overwhelmingly supported by the evidence at trial and no plausible explanation or qualification has been offered to this Court that induces doubt on the subject. This admission, which would, of course, be admissible at any new trial, was only one aspect of an overwhelming and virtually unanswered case of fraud against the appellants. Fraud or wilfully false statements in the proof of loss afford a complete defence to this action. Given the strength of the case of fraud against the appellants and that nothing has been advanced either at trial or as new evidence on this appeal that materially weakens or induces doubt on this aspect of the case, I conclude that the denial of the adjournment did not occasion a substantial injustice and that it would be contrary to the interests of justice to order a new trial.

[45] Like Roscoe, J.A., I have considered the new evidence put forward on appeal as well as the trial record in reaching this conclusion. As would my colleague, I too would dismiss the appeal with costs fixed at $3500.00 plus disbursements.

Cromwell J.A.

Concurred in:

Hallett, J.A.