

05/85

SUPREME COURT OF SOUTH AUSTRALIA

DAWSON (t/as GOODVIBES YACHTS) v DCT

King CJ, Legoe and Cox JJ

13, 30 April, 28 September 1984

[1984] 56 ALR 367; [1984] 84 ATC 4752; (1984) 71 FLR 364**PRACTICE AND PROCEDURE – DEFENDANT UNREPRESENTED – REQUEST BY DEFENDANT FOR ADJOURNMENT – REFUSAL BY TRIAL JUDGE – FACTORS TO BE CONSIDERED: SALES TAX ASSESSMENT ACT (No. 1) 1930 (Cth) SS3, 17, 17A.**

D. carried on business as a boat-builder. In 1981, the DCT took proceedings against D. to recover assessed sales tax plus additional tax for late payment. A defence filed by D.'s solicitors denied liability that D. was a taxpayer within the Act. When the matter came on for trial, D.'s Counsel applied for an adjournment. It was said that D. had changed his solicitors, but was unable to pay his previous solicitors in order to obtain the file. By the time he was able to borrow the necessary money and obtain the file, it was too late to prepare the case. D.'s new solicitors advised D. to seek an adjournment to fully instruct them. The application for an adjournment was refused, whereupon D.'s counsel withdrew and D. conducted his own case. Judgment was given for the Deputy Commissioner. On appeal by D—

HELD: Appeal dismissed.**Per King CJ and Cox J: Relevant considerations when considering applications for adjournment are that:**

(i) Courts have a responsibility to ensure, so far as possible and subject to overriding considerations of justice, that the limited resources which are committed to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice;

(ii) The plaintiff is entitled to have his claim adjudicated upon and enforced without unnecessary delay; and

(iii) There is a possibility that a defendant who is justly liable in respect of a claim may endeavour to postpone his obligations.

KING CJ: (with whom Cox J agreed), *[set out the facts and continued]* ... **[369]** The basic contention on the appeal was that the appellant ought to have been granted an adjournment by the trial judge to enable him to prepare his case and to present his defence fully and adequately. The action came on for trial almost a year after it had been instituted. There is no doubt that the appellant received notice of trial and was aware of the date for trial. Mr Mancini's affidavit shows that he was aware in February that the trial of the action was pending. The relevant principles are set out in the judgment of Deane J, with which the other members of the court agreed in *Squire v Rogers* [1979] FCA 48; (1979) 39 FLR 106 at 113; (1979) 27 ALR 330 at 337:

"The question whether an application for adjournment of a matter should be granted or refused is a matter within the discretion of the trial judge to be resolved according to the overall requirements of justice in the particular circumstances (*Conroy v Conroy* [1917] 17 SR (NSW) 680 at 682). Its resolution may involve the assessment of competing claims by litigants in other cases awaiting hearing in the list of the particular judge or the particular court and may require knowledge of the working of the listing system of the particular court or judge and the importance in the proper working of that system of adherence to dates fixed for hearing. A court of appeal will not, as a general rule, interfere with the decision of a judge of first instance on that question unless it is satisfied that the exercise of his discretion has miscarried in the sense that it had been affected by wrongful application of principle or misunderstanding or erroneous assessment of the factual material before him".

In *Sarunic Bros Pty Ltd v AFG Insurances Ltd* (delivered 12 March 1984) this Full Court also emphasized the discretionary character of the decision by a trial judge of an application for the postponement or adjournment of **[370]** a trial. The Full Court in that case referred to the general considerations involved in such a decision. The Chief Justice, with whose judgment the

other members of the court agreed said:

"The date for the commencement of this trial was fixed in accordance with the ordinary procedures of the court. It is essential to the orderly conduct of the business of the court that trial dates be adhered to.... When a case comes before the trial judge on the date fixed for trial, the parties are entitled to come to court with an assurance that the trial will commence and will proceed, so far as possible, without interruption, to its conclusion. The court, which is in this respect the protector of the public interest, is also entitled to that assurance. Judicial time is set aside for the trial. If the trial does not proceed, there may be loss of judicial time with a consequent effect upon the list of cases awaiting trial and detriment to those involved in them".

The District Court, like the other courts of the State, is subject to great pressure from the volume of cases to be tried. The judges of that court, like the judges and magistrates of the other courts, have a responsibility to ensure, so far as possible and subject to overriding considerations of justice, that the limited resources which the State commits to the administration of justice are not wasted by failure of parties to adhere to trial dates of which they have had proper notice. Moreover, the Deputy Commissioner of Taxation, like other plaintiffs, is entitled to have his claim adjudicated upon and enforced without unnecessary delay. Judges must also bear in mind the possibility that a defendant who is justly liable in respect of a claim may endeavour to postpone his obligation. There is no evidence that that is the motive of the present appellant, but it is right that judges should be alert, as a general consideration when considering applications for an adjournment or postponement of trial, to the risk of persons endeavouring to manipulate the legal process as the means of escaping or deferring their just obligations. These were all relevant considerations for the trial judge. There is no reason to suppose that he overlooked the countervailing consideration that the appellant was unable to obtain his solicitors' file and obtain other representation by reason of lack of funds. It must be said, however, that this consideration was considerably weakened by a number of factors. No attempt was made, so far as we were told, to provide details of the appellant's financial position, nor of the factors which enabled him to borrow money on the eve of trial but not before. Nor was any detail vouchsafed of whatever efforts might have been made to overcome the problem in the light of the approaching trial. It is not known whether the possibility of legal aid was investigated and with what result. What is known, and was known to the trial judge, is that it was not a case of a party who had been advised that there was merit in his case but who lacked the funds to present it; it was a case of a party who had been advised by his solicitors that he did not have a good defence and was nevertheless seeking an adjournment to present the defence which had been the subject of that advice.

It is seldom that an appellate court will feel justified in reviewing a trial judge's decision on an adjournment application, but it may do so if satisfied that in all the circumstances there has been an injustice: *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; [1981] 55 ALJR 701 at 703; 37 ALR 55 at 58. If the issue of the adjournment were confined to the rejection of the application at the commencement of the trial, I do not think that there [371] could be any question of this court interfering with the judge's exercise of his discretion. There were ample grounds upon which he could exercise the discretion in the way in which he did exercise it. But the matter did not stop there. At the conclusion of his evidence the appellant renewed the application. The learned judge then took into account the view which he had formed that the evidence which the appellant sought to obtain could not affect the outcome, because the facts which the appellant sought to establish would not affect his liability to tax under s17A of the *Sales Tax Assessment Act (No. 1)*. At that stage, His Honour's view of the law was clearly an important factor in his exercise of the discretion to refuse the adjournment. If His Honour's view of the law is incorrect, his exercise of the discretion must be regarded as having miscarried, and it would then be necessary for this court to consider the relevant factors, unimpeded by the judge's exercise of discretion, for the purpose of deciding whether there should be a new trial to enable the appellant to call his evidence. It is therefore necessary to consider whether the version of the facts which the appellant seeks to establish can affect his liability to tax.

[His Honour held that D. had no defence to the claim and was clearly liable to the tax claimed].