

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 124/2010

APPLICATION NO 62/2011

**BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)**

BETWEEN	CONRAD GREGORY CUTHBERT DOUGLAS	APPLICANT
	WAYNE ANDREW LEWIS	1ST RESPONDENT
A N D	SHAWN HOPE NICOLE LEWIS	2ND RESPONDENT

Mr Abraham Dabdoub instructed by Clough Long and Co for the applicant

**Mrs Georgia Gibson-Henlin, Lowel Morgan and Marc Jones instructed by
Henlin Gibson Henlin for the respondents**

4 and 5 July 2011

ORAL JUDGMENT

MORRISON JA

[1] On 4 July 2011, we heard an application by the respondent to the appeal for an order that the appeal be struck out for the alleged non-compliance by the appellants with an order of this court made on 19 November 2010. The appeal itself is from an

order granting an interlocutory injunction made by Thompson-James J on 25 October 2010, whereby she restrained the appellants from continuing any construction at 8 Aylsham Heights in the parish of Saint Andrew until the trial of the action in the court below or further order. The appellants have appealed against this order and on 19 November their application for a stay of the order pending appeal, was considered by a single judge of this court who granted a partial stay, the effect of which was to permit the appellants to continue to do work on the first floor of the building, but maintained Thompson-James J's prohibition against the construction being carried out on the second floor of the building and a reed bed on the premises, pending the appeal.

[2] The basis of this application is that the appellants have, it is alleged, in breach of the order, on or about 25 February 2011, recommenced construction on the second floor of the building. In support of this complaint we were very helpfully taken by Mr Dabdoub to a number of photographs exhibited in the affidavit of the respondent, Dr Conrad Douglas, dated 27 October 2010, which was filed in the Supreme Court proceedings. We were also assisted by Mrs Gibson-Henlin who took us through photographs exhibited to the affidavit of the first named appellant, Mr Wayne Lewis, sworn to on 4 April 2011 and filed in this court.

[3] It seems to us that from the photographic evidence, there may be conduct, which is admitted, which might amount to a technical breach of the order of 19 November 2010, that is to say, the addition of a window and a grill door at the top of the stairway leading to the second floor of the building. We accept for the moment

that, as Mrs Gibson-Henlin submitted, the plywood covering described as a shutter over a cavity on the second floor, was actually there before 19 November 2010, which is when this court made the order granting the partial stay. We also accept for the moment Mrs Gibson-Henlin's submission that the painting of what appears to be the upper storey of the building was in fact, a part of the building which provides support for the roof of the first floor. Nonetheless, as we have said, we consider that there may be technical breaches in at least two respects.

[4] Mr Dabdoub therefore says that we should strike out this appeal. He based himself on rule 26.3 of the Civil Procedure Rules which is applicable in this court, by virtue of the Court of Appeal Rules. Rule 26.3(1)(a) gives this court power to strike out a statement of case or part of a statement of case or, in this case a notice of appeal, if it appears that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.

[5] Mrs Gibson-Henlin submitted that rule 26.4 is in fact the one which applies and that what ought to have been done in this case is that, if there was a failure to comply with the order of the court, the respondent/applicant ought to have applied for an "unless order", which would provide the sanction of striking out unless the court's order was complied with, within a stated time.

[6] It appears to us that, as Mr Dabdoub submitted, the application for an "unless order" under rule 26.4 is not a mandatory pre-condition to the application for an order striking out a statement of case for non-compliance under rule 26.3, given the clear

language of that rule ("any other party may apply to the court for "an unless order" emphasis supplied). So on that basis, we do not consider that rule 26.4 is applicable, which leaves us then with the question of what should be the sanction, if any, for what we have described as a technical breach of the order. We do not have the power under the rules to impose a fine, as Mr Dabdoub invites us to do, and we are therefore left with the stark question of whether striking out would be an appropriate sanction in these circumstances.

[7] In our view, in all the circumstances of the case, an order for striking out would be a wholly disproportionate response to the matters of which complaint has been made and we accordingly decline to make such an order. The application that has been filed asks for striking out as its only remedy, and in the circumstances we must therefore dismiss the application. There will, however, be no order as to costs and we will now proceed to hear the appeal.