IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 12/92
MOTION NO. 15/91

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN PARISH COUNCIL OF ST. CATHERINE PLAINTIFF/APPLICANT

A N D WINSTON HENRY DEFENDANT/RESPONDENT

Lennox Campbell and Leighton Pusey of Attorney-General's Chambers for the Applicant

B.E. Frankson and Arthur Kitchin for the Respondent

January 13, 20 and March 23, 1992

ROWE P.:

At the conclusion of the hearing of the motion to enlarge time to enable the applicant to file a notice of appeal after the time limited for appeal had expired, we made an order enlarging the time and enabled the applicant to file notice of appeal on or before February 3, 1992. The applicant was ordered to pay the costs of the respondent. As there was a spirited challenge to the motion we set out our reasons for enlarging time.

The applicant by writ dated June 30, 1989 claimed against the respondent for an order restraining him from continuing to erect a building on Lot No. 2 Old Harbour Road, Sydenham, Spanish Town in the parish of St. Catherine without having previously obtained the applicant's approval in breach of section 4 of the Parish Council's Building (Saint Catherine) By-Law 1950 and for an order that the respondent demolish the said building. On July 31, 1989 an interlocutory injunction was granted restraining the respondent from erecting or continuing to erect the building at Lot 2 Old Harbour Road, referred to in the writ, pending the hearing of the action upon the

applicant's undertaking to abide by any order of the Court as to damages. This interlocutory injunction was discharged on September 18, 1990.

A Statement of Claim was filed on July 24, 1990. It alleged that the applicant was empowered by the Parish Council's Building (Saint Catherine) By-Law to regulate buildings situate within St. Catherine, that section 3 thereof prohibited the construction of any building within St. Catherine without the prior approval of the applicant and that contrary to a notification from the applicant, the respondent continued construction of a building at No. 2 Old Harbour Road. In defence the respondent denied the claims of the applicant and averred that the applicant had no authority or jurisdiction to regulate the respondent's commercial building at No. 2 Old Harbour Road as it was situate outside the limits of the applicant's authority.

The respondent in his counter-claim alleged inter alia that he had the approval of the Ministry of Construction (Housing) to erect the said building and that as a consequence of the interlocutory injunction he had suffered damages amounting to $10,946,826.88. He claimed specific and general damages.

Langrin J. made an order by and with the consent of the parties, upon a summons by the respondent for summary judgment, inter alia, that:

> "1. The Plaintiff be granted leave to file and deliver Reply and Defence to Counter-claim by the 14th day of January 1991.
>
> 2. Thereafter the Defendant have leave to proceed to Assessment of Damages on the Plaintiff's usual undertaking as to Damages."

After a hearing lasting four days, Panton J. assessed damages against the applicant on its undertaking as to damages in the sum of $718,591.73 with interest at 15% from January 1, 1990 to September 30, 1991, totalling $188,113.41. The applicant did not pay; its property

was seized by a Bailiff but not sold upon the order of the Court staying execution on certain terms.

The applicant on November 1, 1991 changed its attorneys and wished to appeal on the basis that:

> (1) The judge was wrong to award damages as the respondent had not obtained permission to build albeit he had been restrained by an invalid notice.
>
> (2) Alternatively, the damages awarded were excessive and only nominal damages ought to have been awarded as the loss suffered by the respondent was consequent upon an illegal activity.

The applicant submitted that the Court should have regard to four questions in its consideration of whether or not to extend time for appealing, viz.:

> (a) the length of the delay since the time of the judgment to be appealed from;
>
> (b) the reasons for the delay;
>
> (c) the chances of success if the application is granted, and;
>
> (d) the degree of prejudice, if any, which the respondent would suffer by the grant of leave to appeal.

Rule 13 of the Court of Appeal Rules provides that notice of appeal should be filed and served within six weeks calculated from the date on which the judgment of the Court below was signed, entered or otherwise perfected. It is unclear from the copy of the judgment in the Record on what date judgment was entered in the Judgment Book. There is a date "Oct. 08, 1991" at the top of the copy judgment and a notation that a copy of the said judgment was served upon the then attorneys on November 14, 1991. Assuming that the judgment was in fact perfected on October 8, 1991, the period of six weeks would have expired on November 19, 1991. The applicant's summons to extend time was filed on December 6, 1991 that is to say, after a lapse of

seventeen days. By itself seventeen days is not an inordinately long period of time but as Fox J.A. said in Brown v. Neil [1972] 12 J.L.R. 669 at 672 - "When this Court is acting under Rule 9 of the Court of Appeal Rules it must act judiciously and judicially." In a felicitous passage he wrote:

> "In exercising the power in r. 9 of the Court of Appeal Rules 1962 'to enlarge or abridge the time appointed ... for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require', the court must act judiciously and judicially. It must strive to order what is fair and reasonable in all the circumstances. It should not appear to have acted by whim. It must proceed in accordance with recognisable principles. At the same time it must be alert to secure its discretion from being imprisoned within precise limits by a too rigid application of principle."

Later in his judgment in Brown v. Neil (supra), Fox J.A. identified two matters which would be relevant for the Court's consideration whether or not to extend time, viz., a serious continuing intention on the part of the applicant to appeal and whether the proposed appeal has merits to which the Court should pay heed.

The English Court of Appeal has provided some guidance on the principles to be applied in this branch of procedure in Norwich and Peterborough Building Society v. Steed [1991] 2 All E.R. 880. There McCowan L.J. said:

> "This is an application for an extension of time for appealing against an order of Knox J dated 15 December 1989. The matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reasons for the delay; thirdly, the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

These are the criteria which Mr. Campbell has asked us to apply. On the material before us, the applicant did not form an immediate intention to appeal upon the assessment of damages. It had no money to satisfy the judgment, its then attorneys could not help, and only then did it turn to the Ministry of Local Government and the Attorney General.

The new attorneys took an entirely different view of the case. They say, and the respondent agree, that premises No. 2 Old Harbour Road, Sydenham, Spanish Town, St. Catherine, falls within the Spanish Town Development Area as defined in the Town and Country Planning (Spanish Town) Confirmed Development Order, 1965. Issue is joined between the parties as to whether the respondent is obliged to make application to the St. Catherine Parish Council pursuant to the Town and Country Planning Act, or whether he is exempt from the provisions of the Confirmed Development Order above by virtue of the provisions of the Housing Act. Those issues can only be resolved at the trial of the substantive action.

The applicant's attorneys submit that the Court acted per incuriam in awarding substantial damages to the respondent on the applicant's undertaking as to damages in advance of the determination of the substantive issues in the case. It is true that as the pleadings stand, there is no reference whatever to the Town and Country Planning (Spanish Town) Confirmed Development Order, 1965, but we are inclined to think that this is more a matter of law than of fact and that the restrictions on the admission of fresh evidence on appeal might not strictly apply. In any event since we were not being asked to admit fresh evidence we decline to give a final decision on that point.

On the issue as to whether or not damages were assessed on wrong principles, Mr. Campbell relied upon Smith v. Day [1879] 21 Ch. 421 and Griffith v. Blake [1884] 27 Ch. 474.

In Smith v. Day (supra), the building owner had agreed to let a part of his property to a tenant and was prevented from doing so because of an injunction which prevented him from completing his building. By a majority the Court of Appeal held that a Court is not bound to grant an inquiry as to damages whenever a defendant has sustained some damage by the granting of an injunction and may refuse any inquiry if the damage restrained is remote or trivial. This case was considered in Griffith v. Blake (supra) when Cotton L.J. who had dissented in Smith v. Day (supra) said:

> "... the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an enquiry as to damages will be granted unless there are special circumstances to the contrary."

The time at which the inquiry as to damages ought to have been made in the instant case cannot now be raised by the applicant as the order to proceed to the inquiry was a consensual one and no application was made to the Court below or before us for leave to appeal under the provisions of section 11(1)(e) of the Judicature (Court of Appeal) Act.

If, as is contended for by the applicant, the respondent was obliged by the relevant Development Order to apply for permission to erect the commercial building on Lot No. 2 Sydenham, that in fact he did so apply, that his application was unsuccessful, then those would be relevant considerations in the assessment of damages on the applicant's undertaking, especially as the damages were being assessed in advance of a final determination on the merits.

The applicant has paid the entire sum for damages and costs into an interest bearing escrow account and consequently there can be no real prejudice to the respondent caused by a delay in his unfettered enjoyment of the fruits of his judgment.

Very substantial issues are involved and in order to do justice to the parties on the principles in Norwich et al Building Society v. Steed (supra), we made the order granting leave to appeal.

FORTE J.A.:

I agree.

GORDON J.A.:

I agree.