Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 12/92

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	PARISH COUNCIL OF ST. CATHERINE	APPELLANT
AND	WINSTON HENRY	RESPONDENT

Lennox Campbell & Leighton Pusey instructed by Director of State Proceedings for the Appellant

Barry Frankson & Arthur Kitchin instructed by Gaynair & Fraser for Respondent

28th April & 15th June, 1992

FORTE, J.A.:

On the 28th April, 1992 having heard the submissions of counsel for the appellant, we dismissed the appeal and ordered the appellant to pay the costs of the respondent. We now fulfil our promise then made, to put in a short note, our reasons for dismissing the appeal.

The appellant, by writ dated the 30th June, 1989 claimed against the respondent, for an order that the respondent be restrained from continuing to erect a building at Lot #2 Old Harbour Road, Sydenham, Spanish Town in the parish of St. Catherine without having previously obtained the appellant's approval, in breach of section 4 of the Parish Council Building (Saint Catherine) By-Law 1950, and for an order that the defendant take down the said building.

On 31st, July 1989 on application of the appellant, an interlocutory injunction was granted in the following terms.

"It is hereby ordered:

"(a) That the Defendant be restrained by himself, his servants, workmen or agents or otherwise howsoever from erecting or continuing to erect a building at Lot No. 2 Old Harbour Road, Sydenham, Spanish Town, in the parish of Saint Catherine, pending the hearing of this action.

(b) That the Plaintiff undertakes to abide by any Order which the Court may make as to damages."

On the 24th July, 1989 a Statement of Claim was filed by the appellant in which it was alleged that the appellant was empowered by virtue of the Parish Council's Building (St. Catherine) By-Law to regulate building on lands situate within St. Catherine, and that section 3 of the said By-Law prohibits the construction of any building within St. Catherine without the approval of the appellant having been obtained prior to the commencement of the construction. It further alleged that the respondent in breach of the said By-Law, commenced the erection of a building at Lot 2 Old Harbour Road, Sydenham, without having obtained the appellant's approval so to do. That in spite of notice served upon him, that the construction was in breach of the aforesaid By-Law, the respondent nevertheless, continued to construct the building at Lot No. 2 Old Harbour Road.

In his defence which was filed on the 5th December, 1990 the respondent denied that he was in breach of section 3 of the Parish Council Building (St. Catherine) By-Law and contended that the appellant had no authority and/or jurisdiction to regulate the respondent's commercial building as the building is located approximately one mile outside the limit of the appellant's authority and/or jurisdiction. In a counterclaim the respondent averred that the erection of the building was commenced with the approval of the Ministry of Construction (Housing), and so as a consequence of the interlocutory injunction he had suffered damages amounting to $10,745,559.18, which he claimed as special damage. He also claimed general damages.

On the 20th December, 1990 upon summons by the respondent for summary judgment, Langrin J, made the following order by and with the consent of the parties:

> "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.

Panton, J after a hearing lasting four days, assessed damages against the appellant 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.

On the 20th January, 1992 the appellant having changed its attorney, was granted by this Court an extension of time within which to file Notice of Appeal against the assessment of Damages, such notice to be filed on or before 3rd February, 1992. The appellant thereafter filed the following grounds of appeal.

> "1. The learned trial judge erred or misdirected himself as to the law in awarding damages to the Defendant/ Respondent when the Defendant/ Respondent had not obtained permission to build, albeit he was restrained in pursuance of an invalid notice.
> 2. Alternatively, assuming the learned trial judge was correct in Law in awarding damages to the Defendant/ Respondent, the damages awarded are excessive and should have been nominal having regard to the fact that the loss suffered by the Defendant/Respondent was consequent on an illegal activity."

In pursuance of ground 1, Mr. Campbell for the appellant, attempted to advance in argument that by virtue of the Town and Country Planning Act the respondent ought to have had prior planning permission before he commenced the erection of the building, as Lot 2 Old Harbour Road, Sydenham, fell within the area to which the Town and Country Planning (Spanish Town) Provisional Development Order 1964, (hereafter called the Spanish Town Development Order) applied.

This Order was of course made pursuant to the Town and Country Planning Act. He conceded that the notice sent to the respondent under the Parish Council Building (St. Catherine) By-Law, as alleged in the Statement of Claim was an invalid notice, but maintained that the appellant was nevertheless entitled to the restraining order by virtue of the appellant's powers under the Spanish Town Development Order. At the advent of his submissions, however, the Court having pointed out to him the fact that this was a point being taken for the first time on appeal and not raised as an issue before the learned trial judge, Mr. Campbell conceded that he could not maintain ground 1, as the learned trial judge could not be faulted for not addressing an issue not raised before him especially in circumstances, of an assessment of damages undertaken with the consent of the parties. He therefore abandoned that ground.

He however pursued ground 2 with a great degree of vigour. He contended that since by virtue of the Spanish Town Development Order which was made under section 5 (1) of the Town and Country Planning Act, the respondent would nevertheless have had to get planning permission from the respondent, and such permission not having been obtained, then despite the invalid notice served under the wrong statute, the respondent should by virtue of public policy be barred from approaching the seat of justice to enforce a claim that had its genesis in an illegal act. He submitted, by reference to the Act and to the Order, that the appellant was the authority empowered under those provisions, to whom application for permission should be addressed, and that the Schedule to the Order, indicated that the land upon which the building was being constructed came within the relevant area.

As attractive, and as interesting as these submissions appeared, they unfortunately have no evidential basis. There is nothing in the record to show or even any allegation that the respondent has not applied or has unsuccessfully applied for permission to erect the building under the provisions of the Spanish Town Development Order, nor in my view to demonstrate that the particular Lot 2 falls within the area designated by the relevant Order. It is surprising that the appellant made no attempt to provide such evidence, as there was more than a hint given in the judgment of this Court which granted it leave to file this appeal out of time. Rowe, P in delivering that judgment Parish Council of St. Catherine v. Winston Henry S.C.C.A. 12/92 (unreported) stated at page 5:

> "... 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."

Later in the judgment at page 6 it was made clear exactly what fresh evidence would be required. Rowe, P stated:

> "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 assessment of damages on the applicant's undertaking, especially as the damages were being assessed in advance of a final determination on the merits."

In spite of these informative words, no application was made to put the appellant's contention on a proper evidential basis, and consequently, there was really no other conclusion possible, than to find that the appeal was without merit, and consequently must be dismissed. We accordingly did so, affirmed the order of assessment and ordered that the appellant pay the cost of the respondent, such costs to be taxed if not agreed.