[2010] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 169/2009

BEFORE: THE HON MR JUSTICE PANTON, P.
THE HON MISS JUSTICE PHILLIPS, J.A.
THE HON MRS JUSTICE McINTOSH, J.A. (Ag)

BETWEEN	**IAN EARL FOLKES**	**1ST APPELLANT**
AND	**COLLETTE ALLEGRO FOLKES**	**2NDAPPELLANT**
AND	**ANDREW WILLIS**	**3RD APPELLANT**
AND	**THE KINGSTON AND ST ANDREW CORPORATION**	**RESPONDENT**

Patrick Bailey and Miss Kristina Exell instructed by Patrick Bailey and Co. for the appellants

Miss Rose Bennett, Mrs Crislyn Beecher-Bravo and Miss Sidia Smith instructed by Bennett and Beecher-Bravo for the respondent

20, 21 April, 24 August and 28 October 2010

PANTON, P.

[1] This appeal is from a judgment of Mangatal J delivered on 18 December 2009 in respect of a claim by the respondent against the

appellants for two declarations and four injunctions in respect of building and developmental activity being conducted by the appellants on premises 2 and 4 University Grove, Elleston Flats, St Andrew, without the necessary approvals having been obtained. The injunctions were claimed under section 23B of the Town and Country Planning Act.

The nature of the claim

[2] The declarations sought were to the following effect:

(a) that the appellants had developed the lands without obtaining planning permission from the respondent; and

(b) that the development of the land was unlawful.

So far as the injunctions were concerned, they were as follows:

(a) to immediately restrain the appellants, their agents and/or servants from carrying out any further development;

(b) to immediately restrain the appellants from carrying out works for the improvement, addition, modification and/or other alteration of any building on the land affecting the exterior of the building and/or the external appearance of the building on the land;

(c) to immediately restrain the appellants, their agents and/or servants from using and/or occupying the land and/or permitting any occupation of it, and/or permitting the carrying out of any activity thereon relating to use and occupation until and unless

approval is sought and obtained from the respondent and the building is certifiably safe for use and occupation; and

(d) to immediately mandate the appellants, their agents and/or servants to pull down and/or demolish the unauthorized buildings or other operation in on over or under the land to the respondent's satisfaction within seven days from the date of the injunction.

Subsidiary orders were sought in respect of the latter injunction relating to the removal of rubble and paraphernalia associated with the development.

[3] The fixed date claim form was supported by an affidavit of Andrine McLaren, the respondent's director of planning. In it, she gave details as to the location and the nature of the activity being conducted by the appellants. She stated that the residents of the community expressed concern at the development in a letter dated 5 March 2008. Consequent on that letter, a site inspection was undertaken on behalf of the respondent and in view of the fact that no planning approval had been granted, a "Cease Work Notice" was issued to the appellants on 10 March 2008. This notice was issued under the Kingston and St. Andrew Building Act. The appellants ignored that notice. A "Stop Notice" was issued on 24 October 2008 under the Town and Country Planning Act. That too was ignored. Efforts to get the appellants to comply with the various laws were unsuccessful.

[4] As at 19 December 2008, according to Miss McLaren, there were on the site 30 self-contained studio units contained on three floors. Each unit has its own entrance, and there are no connecting doors between the units. There are serious defects in the construction of these units so far as the planning and building authorities are concerned. There is also insufficient parking, and there is a breach of the setback requirements. The area is zoned for 30 habitable rooms per acre, but this development is on less than an acre. Sewage disposal, the provision of adequate water, and safety considerations in respect of life and property are all perceived as serious problems facing the developers.

The defence

[5] In their defence filed on 11 February 2009, the appellants apparently did not have the courage to admit that there has been no approval granted for their project, although approval is necessary. Instead, they indicated that "no official application" had been made to the respondent's office. They said that the first time that they were receiving a notice to cease work on the building was in or around October 2008 when "the development was nearing completion". This statement by the appellants is a mere indication of the disregard that many persons have for the planning and building laws of the land. Over

the years, there have been quite a few cases before the courts showing persons developing land without having sought the necessary approval.

[6] The appellants offer in their defence solutions to the many problems pointed out by Miss McLaren in her affidavit. For the purpose of this decision, it is unnecessary to catalogue all that have been put forward. Nor is it necessary to refer to the dialogue that has taken place since October 2008 – dialogue that careful developers would have known they should have had prior to setting out on the expenditure of vast sums of money.

The judge's decision

[7] The learned judge, having heard submissions and given careful thought to all the facts, granted the various declarations and injunctions that were sought.

[8] I feel that no injustice will be done to the arguments that have been advanced before us, if I were to say that the primary focus of the appeal has been on a part of the judge's order as recorded at pages 269 and 270 of the core bundle. That part is reproduced hereunder:

> "E. The Defendants, their agents, and/or servants are restrained from using and/or occupying the land, and/or from carrying out any activity on the land associated with the use and/or occupation of the land; or from permitting the use and/or occupation of the land; and/or from

permitting the carrying out of any activity on the land associated with the use and occupation of the land unless and until approval is sought and obtained from the Claimant and the building is certifiably safe for use and occupation.

F. The Defendants, their agents and/or servants are mandated and ordered to:

(i) pull down and/or demolish the unauthorized buildings or other operation in on over or under the land to the Claimant's satisfaction by 5:00 p.m. on Friday, the 8th of January 2010.

(ii) remove all rubble, debris or other item or material resulting from pulling down and/or demolition of the unauthorized building or other operations in on over or under the land by 5:00 p.m. on Friday, the 15th January 2010.

(iii) remove all paraphernalia associated with the unauthorized building, engineering and/or other operations in on over or under the land by 5:00 p.m. on Friday, the 15th January 2010.

(iv) restore the building and/or other land to its original condition prior to the unauthorized development and to complete such restoration by 5:00 p.m. on Friday, the 15th January 2010.

(v) restore the building and/or other land to the satisfaction of the Claimant by 5:00 p.m. on Friday, the 15th January 2010."

The grounds of appeal

[9] The appellants abandoned their original grounds of appeal, but relied on their amended grounds of appeal listed (a) to (p) at pages 85-89 of the record. Ground (p) was not argued, and it is fair to say that the appellants concentrated their efforts on grounds (a), (b), (h) and (i) which read as follows:

> "(a) The Learned Judge erred and/or misdirected herself in making orders viz: E and F, which are gravely inconsistent one with the other, so that the Appellants cannot reasonably comply with at least one of those orders.
>
> (b) Failing to give the Appellants a reasonable time frame within which to seek the relevant approval, contemplated by paragraph E, before paragraph F comes into effect, which paragraph F mandates the pulling down and/or demolition of the building.
>
> ...
>
> (h) The Learned Judge although appreciating the fact that there is an existing building on the land for which approval could be sought, nonetheless on the 18th December 2009 made an order restricting the use and/or occupation of the land unless and until approval is sought and obtained from the Respondent/Claimant and that the building was certifiably safe for use and occupation. The Learned Judge, in spite of this recognition and clear acknowledgment and direction that approval could be sought, nonetheless ordered the pulling down and demolition of the buildings by the 8th January 2010

despite the fact of the intervening Christmas holidays, thereby allowing the Appellants an unreasonable and unrealistic window of opportunity to seek to comply with one of her orders.

(i) The Learned Judge, notwithstanding the fact that she was aware of an Appeal by the Appellants to the Minister, who has a wide discretion not circumscribed by the Respondent/Claimant, or by the authorities cited by the Judge in the judgment, nevertheless proceeded to deny the Appellant his statutory entitlement to the Appeal and erred in failing to await the outcome of the Appeal. .."

The submissions

[10] Mr Patrick Bailey for the appellants submitted that paragraphs E and F of the order of the learned judge are gravely inconsistent. It will be recalled that the decision of the learned judge was made on 18 December 2009, and that by paragraph E , the appellants are restrained from carrying out any activity on the land "unless and until approval is sought and obtained from the Claimant and the building is certifiably safe for use and occupation", whereas under paragraph F the appellants were ordered to demolish the unauthorized buildings by 5 p.m. on 8 January 2010, and remove all rubble and debris by 5 p.m. on 15 January 2010.

[11] According to Mr Bailey, on the face of it, the appellants were being afforded an opportunity to seek and obtain approval from the respondent. The appellants were in the process of seeking to take steps to obtain the requisite approval, he said. No reasonable time limit had been placed on the pursuing of that activity, yet the appellants by the same order were being directed to demolish the building. The time for approval, he said, was unreasonably short if it was expected that approval could have been obtained by 8 January 2010.

[12] Demolition, Mr Bailey argued, was an unnecessarily drastic remedy considering that the building had not been shown to be structurally unsound or unsafe for human use or occupation. In any event, he said, demolition had to be in keeping with the provisions of the Kingston and Saint Andrew Building Act, particularly sections 48 to 51. These sections require the certification of the chief engineer or a competent surveyor that the building is in a dangerous state, before it may be taken down.

[13] Finally, Mr Bailey submitted that the respondent was aware that an appeal had been filed with the appropriate Minister. If the demolition order was carried out, the appeal to the Minister would become nugatory.

[14] In response, Miss Bennett said that the respondent was totally unaware of the construction until it was contacted by persons in the neighbourhood. By then, the building had reached three stories and was virtually complete. This information, coming from counsel, indicates the level of vigilance, or lack of it, by the respondent over the area under its jurisdiction. Having been alerted to the activity, the respondent then proceeded to take the necessary stops to bring about a cessation. However, as indicated earlier, the appellants ignored the respondents' directives and notices.

[15] Miss Bennett submitted that it is not so that a demolition order is only made when the building is structurally unsound. The authorities, she said, show that demolition applies also where, for example, a building is too close to all the boundaries. She contended that section 23B of the Town and Country Planning Act permits the court to make an order for demolition. The section reads, in part:

> "23B. -(1) Where-
>
> (a) a person on whom an enforcement notice is served under section 23 fails to comply with the provisions of that notice within the period specified therein; or
>
> (b) a local planning authority, the Government Town Planner or the Authority, as the case may be, considers it necessary or expedient for any perceived breach of planning control to be restrained, the local planning authority, the Government Town

> Planner or the Authority, as the case may be, may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Act."

Miss Bennett submitted that "restrain" includes demolition. Mr Bailey's response to that submission was that such interpretation applies only in the United Kingdom. However, given the decision at which we have arrived, it is unnecessary at this time to discuss the court's power to order demolition.

Conclusion

[16] We find Mr Bailey's argument as to the inconsistency of the orders compelling. We agree that the orders E and F are inconsistent. The order E prohibits the appellants from using the property or carrying out any activity thereon unless and until they seek and obtain approval from the respondent, and unless and until the building is certifiably safe for use and occupation. The words "unless" and "until", as used in order E, are clearly qualifying the prohibition against the development. Those words allow or invite the appellants to seek approval prior to further use or activity. If the appellants are to seek approval, then the question of demolition does not arise until a decision has been taken not to approve. It follows that order F may not be executed as it would have defeated

the purpose expressed in order E. In any event, the timetable set out in order F appears to have been impractical.

[17] In the circumstances, the appeal is allowed in part by deleting the order F. The other orders of Mangatal J shall remain in force. There shall be no order as to costs.

PHILLIPS, J.A.

I have read in draft the judgment of my brother Panton, P and I agree with his reasoning and conclusion. I have nothing further to add.

McINTOSH, J.A.

I too am in agreement with the judgment written by Panton, P and have nothing to add.

PANTON, P.

ORDER

Appeal is allowed in part by deleting the order F. The other orders of Mangatal J shall remain in force. There shall be no order as to costs.