

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 74/89

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

BETWEEN	WINSTON HENRY	DEFENDANT/APPELLANT
AND	PARISH COUNCIL OF SAINT CATHERINE	PLAINTIFF/RESPONDENT

Arthur Kitchin for the Appellant instructed by
B.E. Frankson of Gaynair & Fraser

Dennis Morrison for the Respondent instructed by
Dunn Cox & Orrett

April 30 & June 18, 1990

CAMPBELL, J.A.:

This is an appeal from an Order of Courtney Orr J., made in Chambers on July 31, 1989 granting an interlocutory injunction against the appellant restraining him from continuing building operations on Lot 2, Old Harbour Road, Sydenham, Spanish Town. The order was made in consequence of an inter-partes Summons taken out seeking such an order by the respondent who had issued a writ in the Supreme Court seeking injunctive relief against the appellant for that the latter was "continuing to erect a building at Lot No. 2 Old Harbour Road, Sydenham, Spanish Town, in the parish of Saint Catherine without having previously obtained the Plaintiff's approval in breach of section 4 of the Parish Councils Building (Saint Catherine) By-Law 1950."

The affidavit in support of the Summons so far as is relevant stated thus:

- "2. That the Plaintiff is empowered by virtue of the Parish Councils Building (Saint Catherine) By-Law to regulate building on lands situate within Saint Catherine.
3. That section 3 of the Parish Councils Building (Saint Catherine) By-Law prohibits the construction of any building within Saint Catherine without the approval of the Plaintiff having been obtained prior to the commencement of construction.
4. That in breach of the By-Law aforesaid, the Defendant has so commenced to erect a building at Lot No. 2 Old Harbour Road, Sydenham, Spanish Town, in the parish of Saint Catherine without first having obtained the plaintiff's approval to do so."

The affidavit of the appellant in answer to the above paragraphs in the respondent's affidavit so far as is relevant is as hereunder:

- "3. That in response to paragraph 2 thereof I hereby state that by virtue of section 2 (1) of the Parish Councils Building Act the power of the Plaintiff to regulate building on land is limited to the area within the Parish of which is defined by the Parish Council.
4. That in answer to paragraph 3 of the said affidavit I hereby state that by virtue of section 3 of the Parish Councils Building Act the powers of the said Parish Council is subject to the approval of the Minister who may confirm, alter, or add to same.
5. That the said Lot 2 Old Harbour Road, Sydenham was purchased from the Ministry of Housing which said Ministry granted its approval to the Defendant for the construction of a building thereon and I exhibit hereto marked 'W.H.I.' a copy of the said letter of approval dated the 5th day of April, 1989.

- "9. That the plans for the Building for which approval was granted by the Minister of Housing was also submitted to the Saint Catherine Parish Council and that the said Saint Catherine Parish Council knew or ought to know that the Minister granted approval for the commencement of construction.
10. That in respect of the said Plans approved by the Minister of Housing I also sought to obtain approval for the said construction from the Plaintiff but the Plaintiff has failed and/or refused to grant its approval for the following reasons -
 - (1) That it needed proof of ownership
 - (2) Location Plans
 - (3) Covenants and Restrictions touching and concerning the said parcel of land.
11. That your deponent complied with the requests made by the Plaintiff as set out in paragraph 10 hereof and were accordingly advised by the Minister of Housing but the Plaintiff in breach of its duty and in flagrant disregard of the Defendant's rights and activated by malice has failed and/or refused to grant its approval for the construction of the building thereon.
12. That the Saint Catherine Parish Council has failed to establish that they have jurisdiction to regulate the construction of building on premises known as Lot 2 Sydenham in the parish of Saint Catherine.
13. The defendant says further that the approval of the Saint Catherine Parish Council is not required and need not be obtained so as to commence construction thereon, approval having been granted by the relevant Minister."

Before us Mr. Kitchen submitted that the order should not have been made by the learned judge because the respondent had not established that it had jurisdiction over the land on

which the building was being constructed. There was no right enjoyed by the Parish Council for the protection of which an injunction should issue. The pith of his submission is that the Saint Catherine Parish Council had not shown by evidence that "Sydenham" was in a Township in relation to which the said Parish Council had jurisdiction to regulate the construction of buildings.

In reply Mr. Morrison submitted that though paragraph 2 of the respondent's affidavit raised a question of law, paragraphs 3 and 4 thereof were statements of fact that Lot 2 Old Harbour Road, Sydenham was within Spanish Town and so was within the ambit of the Council's By-Law. This fact he submitted had nowhere been challenged by the appellant. Paragraph 13 of the appellant's affidavit did not condescend to a disclosure of facts showing why he said that the Council had no jurisdiction. Thus all that the learned judge had before him was the unchallenged statement that the site of the building was in Spanish Town over which the Saint Catherine Parish Council *prima facie* had jurisdiction. It thus had a right which was in need of protection. The grant of the injunction on this ground was therefore justified.

Mr. Kitchen's alternative submission was that even if the Saint Catherine Parish Council had jurisdiction over the area, its powers of approval of building operations were subject to the approval of the Minister and the latter had in fact given his approval to the appellant. The approval of the Parish Council was thus rendered unnecessary. Therefore whereas the appellant was exercising a right, the Parish Council was acting unlawfully in seeking to frustrate the exercise by him of his right. In such circumstances equity has never given assistance to the wrongdoer. The injunctive relief should not therefore have been granted. Mr. Kitchen

relied in support of his submission relative to approval by the Minister on section 47 of the Housing Act which provides for housing associations submitting to the Minister schemes for subdivision of land and the construction of houses thereon and on section 48 (4) which empowers the Minister to approve the lay-out plan which the Housing association has submitted to the Local Authority for approval and which the latter has unreasonably refused to approve or has unduly delayed in approving.

Mr. Morrison submitted that the appellant could not bring himself within the purview of section 47 of the Housing Act because that section dealt with construction of dwelling houses and not commercial buildings. Equally the appellant was not a "Housing Association" within the definition of that term in section 47 and so he cannot avail himself of any approval by the Minister referred to in section 48 (4) of the Act.

We were of the view that Mr. Morrison's submission on the construction of section 47 of the Act is correct and that praying in aid the said section does not avail the appellant. Thus the submission that the approval of the Minister had been obtained and that this obviated the necessity for obtaining the approval of the Parish Council is fallacious and without merit.

The appellant's affidavit does not state the date when plans for the building had been submitted to the Saint Catherine Parish Council, the date on which requisition for the further information was made by the Council, and the date on which he complied with such requisition. The issue whether or not the Parish Council had refused to grant the approval or was being dilatory in doing so could not therefore have been an issue before the learned judge as there were no primary facts laid before him and in any case these complaints in

paragraphs 9, 10 and 11 are patently inconsistent with the declared stand that it was unnecessary to apply for approval to the Saint Catherine Parish Council.

As we were of the view for the above reasons that there was no merit in the appeal we dismissed the same on April 30, 1990 and promised then to put our reasons in writing. That promise we have now fulfilled.

ROWE, P:

I agree.

Gordon, J.A. (Ag.)

I agree.