

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1985/K-009

BETWEEN KINGSTON & ST. ANDREW CORPORATION PLAINTIFF
AND AUBURN COURT LIMITED 1ST DEFENDANT
AND HARRY FERRIER 2ND DEFENDANT

C. M. M. Daley & Leon Green (instructed by Daley, Walker & Lee-Hing) for the Plaintiffs.

Gordon Robinson & Patrick Brooks (instructed by Nunes, Scholefield, DeLeon & Co.) for both Defendants.

June 3, August 11, 1987

PATTERSON, J.

In December, 1983, the first defendant sought and obtained the permission of the Council of the Kingston & St. Andrew Corporation, to construct an office building limited to a maximum of three floors above ground on premises known as lot 165 and 166, Trinidad Terrace, New Kingston, St. Andrew. A subsequent application to amend the approved plan was refused by the Council. The Plaintiffs avers that the first defendant, and the second defendant, who is the person in occupation of the premises and actually engaged in the construction of the building, have erected a building otherwise than in accordance with the approved plan and the specifications approved, and that although they were served with notices to cease work because of the breach, they nevertheless continued with the construction contrary to the approvals given.

The Plaintiffs filed their writ on the 28th January, 1985, seeking the following reliefs:-

- "1. An injunction to restrain the defendants by themselves their servants or agents from erecting or extending or procuring the erection or extension of any building or structure at or on lands known as Lot 165 and or 166 Trinidad Terrace otherwise

than in accordance and in conformity with the plans and specifications approved by the Building & Town Planning Committee of the Kingston & St. Andrew Corporation save and except that the Defendants are permitted whether by themselves their servants or agents to enter into and upon the basement parking area and the first three storeys of the said building for which planning approval exists in order to continue construction of the said area and to complete same.

2. An injunction to restrain the Defendant by themselves their servants or agents or otherwise from entering into occupation of the said building or from causing or permitting the said building to be occupied whether by their tenants licencees or otherwise howsoever unless and until the said building be made to conform with the plans and specifications aforesaid.
3. An order directing the Defendants to forthwith pull down and demolish and remove so much of the building or structure recently erected on lands known as Lot 165 and 166 Trinidad Terrace St. Andrew as are at variance with the plans and specifications aforesaid.
4. Further or other relief.
5. Costs".

An interim injunction was granted on the 30th day of May, 1985 restraining the defendants in terms of the first and second reliefs referred to above.

The defendants filed their defence in due course, but it is not necessary to recite it, because when the matter came up for trial, the defendants, having given notice of intention to take three preliminary points, argued those points and the Court took time to consider.

The first preliminary point argued was:-

"The Plaintiff has no locus standi to apply for the remedies sought as:-

- (a) The Plaintiff has no private legal rights which it is purporting to protect by the remedies sought; and
- (b) The breach alleged on the Defendants' part is a breach of public right and the only person able to enforce such a right is the Attorney General and not the Plaintiff".

Counsel for the defendants, submitted that the plaintiffs' claim does not disclose that there is a legal right which they are seeking to protect, or indeed that any legal right of theirs has been affected.

He conceded that the plaintiffs could sue in their own name if they had a "private legal right" to enforce by injunction for their protection and he referred to

Gregory & Anor v. London Borough of Camden /1966 / 2 All ER 196 where Paull J. said (p. 203);-

"Before one can come to a Court of law, one must suffer an injuria as well as damnum; one must have suffered a legal wrong as well as an actual loss of money or amenity or something else".

He argues that the plaintiffs had no legal right in the building in question, no proprietary rights in that or an adjoining building, and although they may have some legal right in the road adjoining the premises, they had no legal right whatsoever to be protected. The defendants may have built in breach of building regulations, but any such breach was an infringement of a public right, and the plaintiffs could only apply to the court through the Attorney General in a relator action for an injunction. He relied on the speech of Lord Wilberforce in Gouriet v. Union of Post Office Workers /1977/ 3 All ER 70 at page 84:-

"The Attorney General's right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney General can and the individual (absent special interest) cannot seek to enforce, and private rights is fundamental in our law. To break it, as counsel for Mr. Gouriet frankly invited us to do, is not a development of the law, but a destruction of one of its pillars. Nor, in my opinion, at least in this particular field, would removal of the distinction be desirable. More than in any other field of public rights, the decision taken before embarking on a claim

for injunctive relief, involving as it does the interests of the public over a broad horizon, as a decision which the Attorney General alone is sited to make".

He referred to the cases of Stafford Borough Council v. Elkenford Ltd. /1977/ 2 All ER 519 and Kent County Council v. Batcherlor /1978/ 3 All ER 980, in which the relevant local authority maintained actions in their respective name to enforce a public right, but pointed out the special statutory provisions contained in S.22 of the Local Government Act 1972, (U.K.) which enabled them so to do. He contrasted these with the earlier cases where the local authority could not sue except by a relator action through the Attorney General. He pointed out that there is no statutory provision in Jamaica comparable to the English enactment referred to above and submitted that "in Jamaica the rule is that enforcement of public rights can only come at the instance of the Attorney General by himself or a relator action".

Council for the plaintiffs did not agree with those submissions. He contended that the relevant section by virtue of which the plaintiffs' claim is brought is S10 (2) of the Kingston and St. Andrew Building Act, "and is so phrased in the same words" as that section. He submitted that "the Kingston & St. Andrew Corporation is the enforcing authority, and where the enforcing authority has the right to enforce the Act by taking the steps set out in the Act, the overriding jurisdiction of the High Court can be invoked to prevent a breach of the law and can be invoked by the enforcing authority - can only be enforced by the enforcing authority - the Stafford Borough Council case makes it clear".

He argued that a clear breach of the law had been disclosed by the pleadings, and that the Kingston & St. Andrew Corporation, which is the enforcing authority, need

not take the initial steps set out in the Act, but may "go immediately to the High Court for an injunction". The Attorney General only comes in when there is no enforcing authority and the Act was dealing with a public general right, as opposed to law enacted for the protection of the inhabitants of a specified area, for example, the inhabitants of the parishes of Kingston and St. Andrew, as in this case. The contention here is that the defendants are interfering with the control and management of the erection of buildings in the Kingston and St. Andrew Corporation area by flouting the authority of the Kingston and St. Andrew Corporation and building contrary to the approved plan and also flouting the "cease work notice" served on them.

Counsel for the Plaintiffs submitted further that the Kingston and St. Andrew Corporation had "a statutory duty, right and power" to manage and control the erection of buildings in the corporate area, and it was not necessary to look at the Town and Country Planning Act, as the additional powers conferred on the Kingston and St. Andrew Corporation by that Act are really additional to and not in derogation of its powers and rights under the Kingston and St. Andrew Building Act. On the basis of S 10 (2) of that Act, the Kingston and St. Andrew Corporation "is entitled by injunctive process to compel the defendants to comply with the provisions of the Act and not to contravene it, and to seek an order of the court that such part of the structure which has been erected in violation of the approved plan should be demolished". He expressed the view that where a statute created an offence without creating a right of property and provides a summary remedy, a person aggrieved by the commission of the offence is confined to the summary remedy and cannot

claim an injunction, but that the Kingston and St. Andrew Corporation is not in the position of a person aggrieved.

His final submission was this:-

"When a right or duty is created by statute and an authority is invested with the power of enforcement, then it must be that authority and not the Attorney General that must be the enforcement authority. The action is brought by the Kingston and St. Andrew Corporation on the same authority as it could bring the prosecution in the Resident Magistrates Court or else where, and it could have brought criminal cases or other process, when it need not bring these other proceedings; but when there is a clear breach of the law, the High Court has discretion to grant injunction to restrain further breach, notwithstanding that other proceedings were not taken".

It may be convenient at this stage, to consider the provisions of S 10 of the Kingston & St. Andrew Building Act. S 10 (1) sets out the procedure to be adopted by persons proposing to erect or re-erect buildings and S 10 (2) reads:-

"Every person who shall erect, or begin to erect or re-erect, or extend or procure the erection, re-erection or extension of any such building or any part thereof, without previously obtaining the written approval of the Building Authority; or, in case of dispute, of the tribunal of appeal, or otherwise than in conformity with such approval; and every builder or other person who shall, in the erection, re-erection or extension of such building or part thereof deviate from the plan approved by the Building Authority; or, in the case of detailed or working drawings, by the Surveyor or the tribunal of appeal, shall be guilty of an offence against this act, and liable to a penalty not exceeding two hundred dollars, besides being ordered by the Court to take down the said building or part thereof, or to alter the same in such way as the Surveyor shall direct, so as to make it in conformity with the approval of the Building Authority or the tribunal of appeal".

The plaintiffs have not sought to enforce the breach complained of by the specific remedies provided by S. 10 (2) of the Act (supra), but have instead, sought the

exercise of the courts equitable jurisdiction of granting an injunction to restrain the breach of what Counsel for the defendants contends is a public right.

The general object of the Town & Country Planning Act is to control the development of land comprised in the area to which an order is made, "and with a view to securing proper sanitary conditions and conveniences and the co-ordination of roads and public services, protecting and extending the amenities, and conserving and developing the resources of such area". The Act provides for the appointment of a Town & Country Planning Authority to administer the Act. By virtue of S. 11 application may be made to local planning authority for permission to develop land, and that authority may grant or refuse permission; and in dealing with such application, the local planning authority is required to have regard to the provisions of any development order made in respect of that area. By S. 12 of the said Act, the Town & Country Planning Authority may give directions for applications made to a local planning authority to be referred to it. The local planning authority is, in respect of areas in the parishes of Kingston & St. Andrew, the Council of the Kingston & St. Andrew Corporation and in any other parish, the Parish Council of such parish.

Buildings to be erected, re-erected or extended should only be done in accordance with the Building Act applicable to the area; in Kingston & St. Andrew the Act is the Kingston & St. Andrew Building Act. S. 10 (1) of that act requires a person who proposes to erect or re-erect any building or any part thereof, or to extend any building or any part thereof, to give notice thereof to the Building Authority, which is the Council of the Kingston and St. Andrew Corporation and it sets out the necessary plans to accompany the notice. The plans will not be approved "unless the class of building and the frontage,

elevation and design are in the opinion of the Building Authority suitable to the locality or neighbourhood" and provisions for proper sanitary conveniences are made. S 10 (2) makes it an offence to deviate from the approved plan in carrying out the work.

It is plain that the Kingston & St. Andrew Building Act is supplemental to the Town & Country Planning Act, and together, they protect the public at large against the infringement of public rights. They do not confer any private rights on either the Town & Country Planning Authority or the Building Authority. The remedy for a breach of the nature complained of by the plaintiffs in this action is plainly set out in S 10 (2) of the Kingston & St. Andrew Building Act, but in my view, that is not the only remedy available where there has been a breach. The court has jurisdiction, in an appropriate case, to grant an injunction at the relation of the Attorney General for the enforcement of a public right or where a public right has been infringed, although that right was conferred by a statute that prescribed remedies for its infringement. (Attorney-General (on the relation of Hornchurch Urban District Council) v. Bastow /1957/ ALL ER 497 followed)

The question arises then, who is it that is entitled in the instant case to invoke the court's equitable jurisdiction? Can the Kingston & St. Andrew Corporation sue in its own name or must it bring a relator action? Halsbury Laws of England 4th Edition Vol.37 at para. 230 describes a relator action as "one brought to restrain interference with a public right, whether committed or threatened, or to compel the performance of a public duty or to abate a public nuisance, and in such an action the Attorney General is a necessary

party. The action is brought in the name of the Attorney General at the relation of the person or body seeking to prevent the commission or continuation of the public wrong.....

.....The Attorney General is a necessary party in a relator action because he is the person recognised by public law as entitled to represent the public in a court of justice and he alone can maintain a suit ex officio or ex relatione for a declaration as to public rights".

There are exceptions to the rule to relator actions, as set out at para. 231 of the said volume mentioned above, which reads as follows:-

"The Attorney General is not a necessary party nor is his leave required to bring an action at his relation to enforce the performance of a public duty or to restrain the interference with a public right in following circumstances:

- (1) where the interference with the public right is at the same time an interference with some private right or is a breach of some statutory provision for the protection of the plaintiff;
- (2) where the special damage suffered by the plaintiff is over and above that suffered by the general public, even though there is no interference with any special private right;
- (3) where a local authority considers the bringing of the action to be expedient for the promotion or protection of the interests of the inhabitants of its area".

The plaintiffs have submitted that the third exception mentioned above is of general application and that in any event, they fall within that exception in that the relief sought by the plaintiffs is for the protection of the inhabitants of its area, namely, the parishes of Kingston & St. Andrew. I do not agree. This exception came about by special legislation in

England, viz, S.222 of the Local Government Act, 1972, and before that, only the first two exceptions were known to the law. There is no legislation in Jamaica comparable to S 222 of the Local Government Act, 1972, and the third exception (supra) is not applicable to Jamaica. The pleadings in this action do not bring in within the first or second exceptions, in my view, and accordingly, I hold that the Attorney General is a necessary party to any action which is seeking to restrain infringements of public rights. The Attorney General may sue ex officio or ex relatione. In the event, the plaintiffs have no locus standi suing as they did, and the action must be struck out.

Having arrived at this conclusion, it will not be necessary for me to consider the other two points raised by Counsel for the defendants and which were argued together.

Accordingly, the action is struck out with costs to the defendants to be agreed or taxed.