GRENADA

IN THE EASTERN CARIBBEAN COURT OF APPEAL

HIGH COURT CIVIL
APPEAL MOTION NO. 8 OF 1998

BETWEEN

PHILLIP ALEXANDER
MARALINE ALEXANDER **APPELLANTS**

AND

KENT ESTATES LIMITED **RESPONDENT**

Before: The Honourable Mr. Satrohan Singh Justice of Appeal
The Honourable Mr. Albert Redhead Justice of Appeal
The Honourable Mr. Albert Matthew Justice of Appeal (Ag.)

Appearances: Mr. Derek Knight, Q.C. for the applicants
Mr. Karl Hudson Phillips, Q.C., Miss Wilkinson with him for the respondent

[November 26, 1998]

JUDGMENT

SATROHAN SINGH JA:

This is an application by Phillip and Maraline Alexander (the applicants), for an extension of time for the purpose of applying for leave to appeal from a judgment of St. Paul J. delivered on January 16, 1998. The application though on its face is silent as to its legal origin, must have been brought under 064 R 6 (2) of the Rules of the Supreme Court 1970. This rule required the applicants to show by affidavit

substantial reason for the application and grounds of appeal which prima facie show good cause therefor.

The law to be applied on a consideration of such an application is settled {See

Norwich and Peterborough Building Society v Steed [1991] 2 All ER 880; Mallory v Butler & anr [1991] 2 All ER 889 and a decision of this Court in Simon v Henry & Joseph Civil Appeal No. 1 of 1993}. These authorities show that in addressing an application of this nature we have to consider:- (1) the length of the delay in making the application (2) the reason for the delay (3) the chances of appeal succeeding if an extension of time is granted and (4) the degree of prejudice to the respondent should the application be granted.

An adverse finding against the applicants on any one of these heads would not necessarily result in the demise of the application. The matter is one for the exercise of the Court=s judicial discretion. The Court would have to look at the circumstances under the different heads cumulatively, and, if at the end of the day it can with good conscience say that the applicant has satisfied the statutory requirements of substantial reasons for the application and grounds of appeal which prima facie show good cause, then it should grant the application. I will therefore now address the application under the different aforementioned heads.

(1) <u>Length of Delay</u>

If the delay in making the application is excessive or inordinate, this would be a finding adverse to the granting of the application.

In accordance with the provisions of S 4(1) of Order 64, of the aforementioned rules, an application for leave

to appeal should be made within 14 days of the date the judgment was delivered. From documentation before us, no such application was made until some four months less three days after the judgment was delivered. That application was erroneously made by present Counsel for the applicants to the Court below and was correctly dismissed by the Trial Judge for want of jurisdiction. A second application was made, this time to this Court. It was not an application

for an extension of time for leave to appeal. It was another erroneous application again made by the said Queen=s Counsel, for special leave to appeal. This application was dismissed by the full bench of the Court on July 16, 1998 on the ground that it was misconceived and that it was not an application for an extension of time to apply for leave to appeal. The present application was filed on July 17, 1998.

The application before us today therefore was filed some six months after the date of judgment. We consider this to be excessive delay.

(2) Reason for the Delay

The applicants filed an affidavit in support of their application. Therein they gave their reason for the delay as impecuniosity. They state that at the High Court they were represented by Counsel who, on the 20th January, 1998, suggested to them that they obtain the advice of Senior Counsel. The affidavit then suggested that they were impecunious and that it was only after they had obtained a loan from a bank on May 14, 1998 that they were able to meet the fee of Senior Counsel.

Impecuniosity, established by cogent evidence in an appropriate case, can be considered a substantial reason. However, it is not sufficient for the applicants to make a bare statement without more that they made Aall efforts necessary to obtain the funds to retain Counsel but was unable to do so.@ That should be a conclusion

the Court should be asked to arrive at upon evidence submitted by the applicants of those efforts. They have provided no such evidence for this Court to consider {See Simon v Henry (supra); Evelyn v Williams (1962) 4 WIR 265; Maharaj v Jagroo (1985) 3 WIR 398. Additionally, a careful perusal of the documentation before us has led us to believe, that despite the applicants alleged impecuniosity they always seemed to have had access to Counsel. For these reasons we are of the

view that the applicants have not established a sufficient or substantial reason for the delay.

(3) Chances of Success

The applicants= desire to appeal, is as a result of an order made by St. Paul J., wherein he ordered that their defence in a suit brought by the respondent, be struck out and that judgment be entered for the respondent.

The history of this matter, taken from the skeleton arguments of Queen=s Counsel, Mr Phillips is that the respondent is a developer of certain lands in the North East Grenada. AIt has laid out a development into building lots, several of which have been sold to different persons including the applicants. As appears from the Statement of Claim, covenants have been inserted in each Deed of Conveyance of parcels in the development with the following obligations and restrictions: (i) All building plans have to be submitted to Kent Estate Limited for approval and construction must take place in accordance with such approved plans. (ii) Each lot is to be used for residential purposes only and it is expressed in each Deed that this restriction is for the benefit and burden of each of the owners for the time being of lots in the development and enforceable by each of them *inter se.* Each Deed of Conveyance contains the same restrictions expressed to be for the benefits of and to bind all the land owners in the development from time to time in perpetuity. (iii) Kent Estates Limited covenanted in the Deed of Conveyance to the appellants

that identical restrictions had and would be inserted in each conveyance of a parcel of land in the development. The defendants/appellants purchased a parcel of land from Kent Estate Limited by virtue of a Deed of Conveyance containing the above restrictions. After purchase they submitted plans to Kent Estates Limited for residential premises and the same were approved. They however, proceeded to

construct premises not in accordance with the approved plans and for commercial

premises. Kent Estates Limited sought and obtained an injunction restraining the appellants from proceeding with the unauthorized structure at an early stage. The appellants in defiance of the injunction proceeded to construct apace. They were undeterred by a motion for contempt which is still pending before the High Court. The defence on the pleading is that, after they had executed the Deed of Conveyance containing the above-mentioned restrict covenants, they were told by an employee of Kent Estates Limited that they could construct business premises notwithstanding the restrict covenants. This was denied by Kent Estates Limited.@ These facts have not been disputed before us by Queen=s Counsel, Mr Knight.

The Trial Judge struck out the applicants= defence on the following grounds:

> A**(i) The oral representation relied upon by the applicants could not alter or defeat the clear terms of the Deed of Conveyance and in any event**
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> **(ii) The particular restrictions being for the benefit of a building scheme could not be waived without the concurrence of all the owners of parcels of land in the building scheme {See Texaco Antilles Limited v Kernochan (1973) 2 ALL ER 118 PC; re Tiltwood, Sussex (1978) 2 ALL ER 1091}**
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> **(iii) There was no averment in the defence indicating that the restrictions had been extinguished.@**

He then entered judgement for the respondent. Part of that judgment ordered the applicants to demolish that structure on lot #6 forthwith.

The proposed grounds of appeal are:

A(i) The Learned Trial Judge erred in law and misdirected himself when he ordered that the defence of the defendants/appellants be struck out under the Rules of the Supreme Court Order 18 rule 19 and under the inherent jurisdiction of the Court on the ground that it discloses no reasonable defence.

(ii) The order of the Learned Trial Judge that >The defendants do forthwith demolish the structure now

erected on lot #6' is unreasonable and a miscarriage
of Justice in that there was no evidence or no
sufficient evidence that the building as constructed
was in breach of any covenant contained in the said
Conveyance.

(iii) The order of the Learned Trial Judge that
defendants do forthwith demolish the structure now
erected on lot #6' is unreasonable and a miscarriage
of Justice in that there was no evidence or no
sufficient evidence on which the Learned Trial
Judge could have found that the defendants/
appellants were in breach of any of the covenants
contained in the Conveyance.

(iv) The order of the Learned Trial Judge is
unreasonable and a miscarriage of Justice in that
he failed to consider whether damages was a
suitable remedy to give to the plaintiff in the
circumstances of the case.@

Mr Knight, in his arguments before us, submitted that the real concern of the applicants was the demolition order made by St. Paul J. He suggested that damages would have been a suitable remedy. Prima facie, it is difficult to find merit in this submission when the offending structure was not an approved dwelling house as contemplated by the covenant contained in the Conveyance. Indeed, Learned Queen=s Counsel conceded that the applicants do in fact have their covenanted dwelling house and that the offending building was an additional

structure contemplated by them for commercial purposes, a purpose which was offensive to the building covenant. Prima facie therefore, on the undisputed facts aforementioned, as a matter of law, these grounds of appeal appear to be devoid of merit.

(4) Prejudice

On the issue of prejudice, Learned Queen=s Counsel, Mr Phillips in his skeleton has stated that other purchasers of lots in the development who have paid their deposits have refused to complete because of the declared intention of the

appellants to carry on a place of entertainment. Others who have completed their purchases have advised the respondent that they will not proceed to build until they are assured of the integrity of the residential nature of the building development. He also stated that the delay has been a source of economic loss to Kent Estates resulting from the reluctance of purchasers to complete.

These facts are disclosed in the affidavit filed in the proceedings for the injunction and for contempt. In my judgment, these circumstances show serious prejudice to the respondent should the application be granted.

Conclusion

On all heads therefore we are of the view that this application must fail. In our judgment, the applicants have failed to establish the statutory requirements of

substantial reasons for the application and grounds of appeal which prima facie show good cause therefor. The application is accordingly dismissed with costs to the respondent to be taxed if not agreed. Even if it could have been successfully argued that the reason given for the delay was a substantial one and/or there was little or no prejudice to the respondent should the application be granted, in my judgment the applicants would have suffered the same fate because of the prima facie lack of merit in the proposed grounds of appeal.

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Satrohan Singh
Justice of Appeal

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Albert Redhead
Justice of Appeal

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Albert Matthew
Justice of Appeal

(Ag.)