TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 36 of 1992
H.C.A. No. 3982 of 1990

IN THE MATTER OF AN APPLICATION BY JAMAAT AL MUSLIMEEN (A PERSON ALLEGING THAT THE PROVISIONS OF CHAPTER 4 OF THE CONSTITUTION HAVE BEEN CONTRAVENED, ARE BEING CONTRAVENED AND ARE LIKELY TO BE CONTRAVENED IN RELATION TO IT) FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE SAID CONSTITUTION

BETWEEN

JAMAAT AL MUSLIMEEN

Applicant/Appellant

AND

JULES BERNARD
COMMISSIONER OF POLICE

COLONEL RALPH BROWN
ACTING CHIEF OF DEFENCE STAFF

THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO

Respondents

Civ. App. 36/92 Jamaat Al Muslimeen v Police Commissioner Jules Bernard + others

AND

Civil Appeal No. 37 of 1992
H.C.A. No. 3982 of 1990

IN THE MATTER OF AN APPLICATION BY JAMAAT AL MUSLIMEEN (A PERSON ALLEGING THAT THE PROVISIONS OF CHAPTER 4 OF THE CONSTITUTION HAVE BEEN CONTRAVENED, ARE BEING CONTRAVENED AND ARE LIKELY TO BE CONTRAVENED IN RELATION TO IT) FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE SAID CONSTITUTION

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JULES BERNARD
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THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO

Respondents/Appellants

AND

JAMAAT AL MUSLIMEEN

Applicant/Respondent

* * * * * * * * *

Coram: C.A. Bernard, C.J.
R. Hamel-Smith, J.A.
L. Gopeesingh, J.A.

Dated: 10th February 1994.

Appearances:
Mr. R.L. Maharaj for the Applicant.
Ms. D. Hackett for the Respondents.

J U D G M E N T

Delivered by C. Bernard C.J.:

This is a Notice of Motion by the Jamaat Al Muslimeen ("the applicant") filed on 15th September, 1993 against the Commissioner of Police, the Chief of Defence Staff and the Attorney General ("the respondents"). It is concerned with two pending appeals relating to High Court Actions Nos. 36 of 1992 and 37 of 1992 which were heard together by Brooks J. and who in a written judgment No.3982 of 1990 dated 13th January, 1992 gave judgment in favour of the applicant in Action No. 37 of 1992 whereas in Action No. 36 of 1992 he gave judgment in favour of the respondents all of whom were the due and proper representatives of the State in both actions. Suffice it to state that within the time permissible under the Rules of Court ("the Rules") both parties appealed against that part of the decision of Brooks J. that was unfavourable to it.

In its Notice of Motion the applicant is seeking to have the respondents' appeal in Action No. 37/92 dismissed for want of prosecution under Ord. 59, r. 19(2) and/or the inherent jurisdiction of the Court.

The respondents have now met the application of the applicant by one for an extension of time under Ord. 3, r. 5(2) to pursue their appeal against the decision in Action No. 37 of 1992.

The dispute between the parties is concerned, inter alia, with the alleged right of the applicant to occupy and to remain in occupation of lands at No. 1 Mucurapo Road in Port of Spain and the alleged unlawful interference with the peaceful enjoyment of those lands coupled with the destruction of a number of buildings standing thereon by a cadre of police officers and soldiers of the Central Government under the command of the respondents.

It is common ground, as found by the trial judge in his judgment which is of record, that the lands at No. 1 Mucurapo Road are comprised of two separate and distinct parcels. One was owned wholly and exclusively by the Port of Spain Corporation which is an entity distinct and separate and apart from the Central Government. All the buildings in the controversy were on the Corporation's lands. Apart from the fact that both sides were in accord about this, the trial judge was fortified in making this positive finding in the light of the evidence of Andrew Bowles - a Government Land Surveyor - who was a representative for the State and who had deposed to this effect. This parcel measured, according to Bowles, 1.5203 hectares. The other parcel belonging to the State measured 1.9324 hectares.

The Port of Spain Corporation was not a party to the proceedings between the applicant and the respondents. For reasons which, it is hoped, will appear in the course of this judgment, I desire to record here, so far as relevant, the reliefs that had

been sought in High Court Action No. 3982 of 1990 (a consolidation number of Actions 36 and 37/92) and the Orders later granted by the trial judge in regard to the parcel of land belonging wholly and exclusively to the Port of Spain Corporation which, as I said, is a body that is separate and distinct from the Central Government. It was in the following terms:-

> "(1) . . . . . .
>
> (2) a declaration that the entry and occupation by the State of the parcel of land (measuring 1.5203 hectares). . . . . from the 10th day of December 1990, to the 6th day of February 1991 was unconstitutional and illegal in that it contravened the applicant's rights as guaranteed in Sections 4(a), (b) and (h) of the Constitution of Trinidad and Tobago;
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> (3) A declaration that the demolition and destruction on or about the 18th day of September 1990 or at anytime during the State of Emergency between the 28th day of July 1990 to the 9th September 1990 by the State, its servants and/or agents of the State of buildings owned by the applicant and/or used by the applicant on the lands described in the said Plan referred to in . . . (2) above as lands of Port of Spain City Council occupied by Jamaat 1.5203 hectares, is unconstitutional

and illegal in that the said action by the State contravened the applicant's rights guaranteed in Sections 4(a), (b) and (h) of the Constitution;

(4) a declaration that the action of the servants and/or agents of the State between 28th day of July 1990 and the 6th day of February 1991 in damaging the Mosque which stands on the said lands as described in relief (3) above contravened the applicant's rights as guaranteed in Sections 4(a), (b) and (h) of the Constitution of Trinidad and Tobago."

For reasons which will appear later and which I apprehend should also have a material bearing on the outcome of this application when all the relevant factors are "put in the mill", I respectfully desire to advert to two incontrovertible features of the case before the trial judge.

The first of these is that there was no cross-examination on the affidavits filed by either party. Both parties left it exclusively to the trial judge to find the facts and to draw inferences. The trial judge did just that.

The next thing has to do with the judge's approach to the incontrovertible facts relating to the parcel owned wholly and

exclusively by the Port of Spain Corporation and on which stood all the buildings belonging to the applicants and in respect of which the latter was in possession (H.C.A. 37/92). Since the complaint by the applicant against the respondents (who it was admitted were not, beyond any shadow of a doubt, servants of the Corporation) was grounded in trespass to land, the trial judge said this (pp. 81-82):-

> "The evidence discloses that the [Islamic] Guild went into occupation of the Corporation's land at No. 1 Mucurapo Road, St. James, in 1969. See paragraph 8 of the affidavit of Muhammad Ahmad Tariq, which is undisputed.
>
> "The evidence further reveals that from 1972 onwards the [Islamic] Guild was replaced on the Corporation's land at Mucurapo by the unincorporated Jamaat - although it is not clear by what means it did so. The fact remains, however, that from 1972 onwards the unincorporated Jamaat went into occupation and possession of the Corporation's land at Mucurapo, and this evidence is uncontroverted. The history of events further indicates that the unincorporated Jamaat, on becoming incorporated on the 28th November 1989, remained in occupation and possession of the Corporation's land at Mucurapo. Furthermore, the Board of Management of the

Applicant Company is comprised of persons who made up the old unincorporated Jamaat, and its membership is more or less the same. Both Sadiq Al Razi and Muhammad Ahmad Tariq deposed that a permanent Mosque was first constructed by the unincorporated Jamaat on the Corporation's land in 1984 - and then later on a medical clinic, a primary school, a grocery, a boutique, a garment factory and four housing quarters - all on the said land. This evidence was unchallenged, and I accept same.

"There can be no doubt that the occupation both by the unincorporated Jamaat and by the Applicant Company of the Corporation's portion of the land at Mucurapo was illegal - at least vis-a-vis the Corporation. But, as regards any other person (including the State) who was not the owner, it was not. The [Islamic} Guild was first of all in occupation and possession; then, the unincorporated Jamaat; and thereafter, the Applicant Company. This occupation and possession by the unincorporated Jamaat and finally by the Applicant Company gave them a better right and title to the Corporation's land than the State. It also gave them (and in particular, the Applicant Company) a better right and title to the Corporation's land than anybody else, except the true owner - which is the Corporation.

"In Salmond on the Law of Torts, 16th Edition, p. 95, it is said that -

> 'Even a wrongdoer with possession can bring trespass against a person without title, but not against the owner of the goods or anybody acting with his authority.'

"The defence of jus tertii can only be successfully pleaded where the defendant acted under it - that is to say, where the defendant acted for and on behalf of the true owner, or is defending the action by the authority of the true owner."

And with respect to the respondents' role in this particular regard the trial judge later had this to say at pages 82-83:-

"There is no evidence here that the State at any material time was acting for and on behalf of the Corporation, or with the authority of the Corporation when it entered upon the Corporation's land which was in the occupation and possession of the Applicant Company at that particular time. Whilst the Corporation's land was in the occupation and possession of the Applicant Company for however short a period, apart from the Corporation, the State was not at liberty to interfere with that

occupation and possession without lawful justification or excuse. Furthermore, no lawful justification or excuse has been shown by the State at any time in these proceedings for its interference with the Applicant Company's occupation and possession of the Corporation's land at No. 1 Mucurapo Road, St. James by the State's entry upon the occupation of the Corporation's land there whilst it was in the occupation and possession of the Applicant Company at the material times. The State has no business upon the Corporation's land whilst it is in the possession and occupation of the Applicant Company - and it cannot plead or rely upon the Applicant Company's illegal occupation as against the Corporation as a defence, as this defence can only be successfully asserted by the rightful owner of the land itself - the Corporation, or by the State if it was defending these proceedings with the authority of and for and on behalf of the Corporation, which is not the case here. To assert here, as the State has done, that the ex parte injunction granted by Mc Millan J. is still in force is of no avail to the State, as the State cannot rely on that Order. The injunctive order can only be relied upon by the Corporation as a defence, if it had been made a respondent in these proceedings, or if it had intervened in them as a defendant."

Also, another contention of the respondents through their attorney had to do with the absence of the Corporation as a party to the proceedings and the inability of the Court to make a declaration in the circumstances. As to this the response of the trial judge was this:-

> "The Applicant Company is merely asking for a declaration against the respondents that the entry on and occupation by the State of a parcel of land (measuring 1.5203 hectares and 1.9324 hectares as described in the plan of Mr. Bowles) from the 10th December 1990 to the 6th February 1991 was unconstitutional and illegal in that it contravened the Applicant's rights as guaranteed in Sections 4(a), 4(b) and 4(h) of the Constitution. In short, the Applicant is merely saying that the respondents' entry on and occupation of lands of which I am in possession is unconstitutional and illegal. Now, therefore, how on earth can such a declaration really affect the Corporation's interest or title in the land or in any way derogate from it? What is more, the Corporation must have had notice of these proceedings, as these proceedings received wide coverage in the media. It has chosen not to defend this matter or to intervene in it.
>
> "The Corporation has stood by idly and indifferently

and has watched all that has taken place without lifting a finger in its own interest. Furthermore, it will be observed that all the other reliefs sought by the Applicant Company are in similar vein. Accordingly, I am unable to uphold Mr. Thorne's submission on this point. The general principles enunciated by him on this issue do not, in my respectful view, apply to the circumstances of this case. In short, I do not think that the Corporation will in any way be prejudiced or affected by the grant of the reliefs sought in this matter."

Now, in so far as Action No. 37 of 1992 is concerned, the trial judge having found the facts and drawn inferences made the following orders:-

"(1) that a declaration be granted and is hereby granted (as stated in Relief No. 2 of the Applicant's amended Notice of Originating Motion) to the effect that the entry and occupation by the State of the parcel of land at No. 1 Mucurapo Road, St. James, (the Corporation's portion of the land there measuring 1.5203 hectares as described in Plan B exhibited to the affidavit of Andrew Bowles with boundaries as demarcated therein) during the period 21st day of April 1990 to the 10th February 1991 and continuing was

unconstitutional and illegal in that it contravened the Applicant's rights as guaranteed in Sections 4(a) and 4(b) of the Constitution of Trinidad and Tobago;

(2) a declaration that the demolition and destruction on or about the 18th day of September 1990, or at anytime during the State of Emergency between the 28th day of July 1990 to the 9th September 1990 by the State, its servants and/or agents of buildings occupied by and in the possession of the Applicant Company, and/or used by the Applicant Company on the Corporation's land at No. 1 Mucurapo Road, St. James, (the said 1.5203 hectares) is unconstitutional and illegal in that the said action by the State contravened the Applicant's rights as guaranteed in Sections 4(a) and 4(b) of the Constitution;

(3) a declaration that the action of the servants and/or agents of the State between the 28th day of July 1990 and the 6th day of February 1991 in causing damage to the Mosque which stands on the said land as described in Order No. (1) above contravened the applicant's rights as guaranteed in Sections 4(a) and 4(b) of the Constitution;

(4) a declaration as against the State that the Applicant and/or its servants and/or agents and/or licencees and/or visitors are entitled to enter upon and to remain upon the said land as described in Order No. (1) above;

(5) costs, in relation to the successful parts of the Applicant's application - to be taxed and paid by the Respondents to the Applicant Company."

The formal notice of motion of the applicant for the dismissal for want of prosecution of the appeal in Action No. 37 of 1992 was, as I said earlier herein, made pursuant to Ord. 59, r. 19(2) of the Rules and/or the Court's inherent jurisdiction and the case of Alladin v. Alladin, Civil Appeal No. 49/78 was cited and relied upon by them in the argument. On the other hand, the application by the respondents for enlargement of time to pursue their appeal in this action was contained in the affidavit of their attorney, Christopher Grant, and which, in the prevailing circumstances, was allowed by this Court to be used under and by virtue of Ord. 59, r.3(1). The respondents relied upon the case of Gordon v. Yorke and Elias v. Yorke, Civil Appeal Nos. 92 and 93/81. I would come to the merits of the respective affidavits which have been filed by both parties in due course; but for the moment I desire to allude to the two cases cited by the different parties.

Alladin v. Alladin supra was an application to restore an appeal which had been dismissed sometime before for want of prosecution. In that case Braithwaite J.A. (with whom the other members of the Court agreed) touched upon the facts and findings in the case. In addition he expressed his thoughts about such applications. In summary they were these:-

(i) Whatever the state of affairs it was a necessary concomitant of the Rules that "an application for extension of time within which to file the Record of Appeal must be made in order to keep the appeal alive."

(ii) In any event, on the facts, no good and substantial reasons had been advanced to permit of the Court of Appeal's discretion to admit the appeal for further adjudication by the appellate tribunal.

At the end of the day the Court refused the application.

In Gordon and Elias v. Yorke (No. 1) supra, similar applications to that in Alladin supra were made. The panel of Judges in Gordon was the same as that in Alladin. In that case Kelsick C.J., with whom the other members of the Court agreed, opined that "the unavailability from the Court of the record or a material part thereof . . . . is usually sufficient cause or reason for the Court to grant an application for an extension of time to

file the record and to refuse the respondent's application to dismiss the appeal for want of prosecution."

Kelsick C.J. later touched upon the merits. As he considered it, having regard to all the circumstances, to be a "borderline case," he reluctantly moved for restoring the appeal but on conditions. Suffice it to say that those conditions were not later observed. So, following later similar applications by the parties, the appeals were dismissed on the ground, among other things, that the evidence disclosed a comtumelious and intentional default by the applicants. See Gordon v. Yorke (No. 2) (1985) 35 W.I.R. 312.

I consider that Kelsick C.J.'s use of the expression "usually" to be one which lays down no hard and fast rule but that it recognises and admits to exceptions within the rules vis-a-vis the proper exercise of the Court's discretion at least in cases of the kind.

Another case which was concerned with the timetable under the Rules was that of Martin v. Chow (1985) 34 W.I.R. 379 which was cited with approval by the Court in Alladin supra. This was a case which was concerned with the filing of an appeal out of time due to the fault of the appellant's attorney. The Court drew attention to the necessity, as a general rule, to observe the prescriptions as to time in the Rules but indicated that, in the exercise of the discretion of the Court as to whether it should facilitate an

applicant in breach of the Rules, regard must be had to all the circumstances of the particular case. The Court granted the application.

In my view, the judgments to which I have just referred demonstrate how the Court of Appeal here has tended to approach matters of the kind. It is clear from these decisions that, prima facie, it has sought to insist upon a successful party being entitled to the fruits of his judgment subject, of course, to the right of the unsuccessful party to pursue the matter further; provided that this is done without undue detriment or prejudice to the former. That, in my view, is what the Rules are intended to procure, to establish and to preserve. Otherwise, it could safely be said that there would be no end to the timetable for litigation or for that matter litigation itself.

It is in the foregoing recited context, together with what has been averred in the relevant rival affidavits filed by the parties in the instant applications to which I will come later in this judgment, that, in my view, the Court should exercise its discretion one way or the other. I admit, of course, that this approach is <u>not</u> usually the norm. On the other hand, this does not mean that in <u>special circumstances such as these,</u> this Court is so debarred. After all this is <u>not</u> the run of the mill type of case between private individuals. Even so, in another context, this Court looked at the merits of the appeal in order to decide where

its hammer should fall. See Alladin supra and Gordon (No. 1) supra. Moreover, the claim here was one of constitutionality involving a member or members of the citizenry and the de facto State and thus of a public nature and in respect of which the history thereof is legion and, as such, quite notorious. The distinction, in my view, is important. If I am proven, at some later stage, to have come to a wrong conclusion on this, then I would content myself that in the interest of "fair play", justice and the rule of law, I had preferred, albeit wrongly, to have erred on this side of the scale.

Before I go on to deal with the instant matters, I should mention that in England there has been a divergence of opinions and observations about the approach to applications of the kind. The concerns and anxieties were such that recently the Court of Appeal there, through Sir Thomas Bingham M.R. in Costellow v. Somerset County Council (1993) 1 All E.R. 952; (1993) 1 W.L.R. 256, saw it fit to lay down guidelines in regard to the approach in these and other related matters covered by the Rules for the judges and practitioners.

In that case the learned Master of the Rolls in the report of the case in the All England Report just cited said (Pg. 959 - B-H):-

"We are told that there is some uncertainty among

practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can.

"As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord. 19, r. 1; Ord. 24, r. 16(1); Ord. 25, r. 1(4) and 1(5); Ord. 28, r. 10(1) and Ord. 34, r. 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.

"The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time

conferred by Ord. 3, r. 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

"Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord. 3, r. 5, and would indeed involve a substantial rewriting of the rule.

"The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate." [Emphases Mine]

And later he proceeded to say this (p. 960 - A-D):-

"Cases involving procedural abuse (such as Hytrac Conveyors Ltd. v. Conveyors International Ltd. [1982] 3 All E.R. 415, [1983] 1 W.L.R. 44) or questionable tactics (such as Revici v. Prentice Hall Inc. [1969] 1 All E.R. 772, [1969] 1 W.L.R. 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords. 19, 24, 25, 28 and 34. The approach to applications under Ord. 3, r. 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under

Ord. 3, r. 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."

[Emphases Mine]

These guidelines are salutary and I would respectfully adopt them for use by our judges in this jurisdiction.

Now, I readily accept that these guidelines were intended primarily for use in relation to rules which have been particularised in the judgment. Even assuming this to be the case, (which I most certainly question in the light of the provisions of Ord. 3, r. 5 of the Rules here, as in England) nevertheless, I see no good or valid reason why in the special circumstances of this case where here, as in Costellow supra, the applications are alike, I cannot, where appropriate, also borrow from the observations and injunctions therein and apply them to the instant matters bearing in mind the following cardinal principles:-

(a) That while the Court in its inherent jurisdiction has the power to dismiss an appeal for want of prosecution, it does not lightly do so;

(b) The need for an applicant who seeks an enlargement of time under Ord. 3, r. 5 to file the Record after the time limited by an Order of the Court to show good and substantial

reasons for the application.

See also Ord. 59, r. 17(1); Ord. 59, r. 21.

In the instant matter the undisputed facts were these: Following the filing of the appeals by the respective parties, Gopeesingh J.A. on different days in June 1992, heard and determined separate applications for extension of time to file the Record. In both cases he granted an extension for up to six (6) months from the date of the settling of the Record. In the interim, a written request to the Registrar was made by the respondents' instructing attorneys for the trial judge's Notes of Evidence. They were informed by the Registry by letter dated 11th May 1992 that they were not yet available but that as soon as this was the case, they would be so advised.

The Records in both appeals were settled on 2nd April 1993. There then followed applications by the parties in the following month of May for the consolidation of both appeals in order, among other things, to save costs and to abridge the time for the filing of the Record which, it was their joint hope, would speed up the time for the hearing of the appeals. This arose as a result of a written agreement between the parties in the said month of May and in which attorneys for the respondents also agreed to prepare and file the Record if leave to consolidate was granted. On the basis of this agreement Gopeesingh J.A. on 28th May 1993, by consent of

the parties, ordered that the appeals be consolidated as one action; that the preparation and filing of the Record be undertaken by the respondents' attorneys; and that it be filed by 14th June.

The appointed day for the filing of the Record contained in the Order of Gopeesingh J.A. came and went. It is significant that, notwithstanding the strictures of this Order, no formal application was made to the Registrar for the relevant documents either before the appointed date or thereafter. Worst still no application was made to enlarge the time. This Court was told that court clerks attached to the office of the respondents' attorneys had made oral requests of the Registry for the trial judge's Notes of Evidence with negative results. We have no affidavit before us from any such officer to this effect. In any event, it was still incumbent upon the respondents' attorneys to seek an extension of time if only to demonstrate their bona fides. But the matter did not end there. In a matter of a few weeks following the appointed date for the filing of the Record - that is to say on 7th July to be precise - the respondents' attorneys were formally advised by the Registry that these Notes were available. This Notice did not seem to stir them into action for July came and also went; and yet no application was made by them to enlarge the time.

A warning came to the attention of the respondents' attorneys

the next month. It was from the applicant's attorneys. In this connection, on 4th August the latter by letter called on them to file the Record failing which they would be forced to seek an Order of the Court to dismiss their appeal. I should have thought that if the respondents had had any serious intention to pursue their appeal, this serious warning would have galvanized their attorneys into positive action. Despite this warning August came and went; yet still the respondents again failed to seek an extension of time.

Now that the applicant has sought the aid of the Court the respondents promptly seeks the Court's indulgence to enlarge the time. They pray in aid the claims that they were awaiting a document from the other side and that the delay is only one of 31\2 months.

My short answer to the first claim is that whatever that may be, the respondents' attorneys were still obliged to seek an extension of time and to offer the appropriate explanation and more particularly so in view of the warning they had received! But that is not all. The evidence before the Court, which has not been disputed, is that this same document had formed part of the record of the respondents' case in the trial; that it formed part of the proceedings therein; and that as such was itself available from the Court's Registry!

In my opinion, delay is a relative term and, therefore, must be looked at in the context of all the pertinent facts and circumstances. It does not necessarily follow that a delay, though short in time, can in no way create or give rise to a real risk of prejudice to the other side.

Having regard to all the circumstances, I am not satisfied that good and substantial reasons have been proffered by the respondents for the delay and that no special circumstances have been shown to justify the exercise of the Courts' discretion in their favour. With great respect to the respondents, I do not regard their omissions as mere instances of negligence. On the contrary, in the light of the prevailing circumstances, I regard their conduct as falling within any one or more of the following categories itemized in Costellow supra namely - (i) procedural abuse; (ii) questionable tactics; (iii) contumelious and intentional default. I admit that this is quite a strong indictment but I fear that the facts compel me to so find. This is sufficient to dispose of the matters before this Court in the applicant's favour.

But there is something also to be said in the applicant's favour and it is this: The risk of prejudice to the applicant is not only real, but is continuing. I propose now to demonstrate why I take this view.

<u>In a case such as this one</u>, in order that the Court could properly exercise its discretion, regard in my opinion could and should also be had to the real and existing state of affairs. Hence the reason why I adverted earlier to the facts as found by the trial judge and his application of the law to those facts as contained in his judgment which, as I said earlier, is a matter of public record. I considered it necessary also to do so <u>in the peculiar circumstances of this particular case</u> in order to determine, as part of the Court's duty to exercise its discretion reasonably and properly, whether the respondents had a competent appeal, or put another way - whether they had a legitimate cause for proceeding with it.

It is to be remembered that the claim in Appeal No. 37/92 by the Applicant is one grounded in possession. In this regard, it is established law that a party in possession has the dominant right against others who seek to dispossess him except as against one who has a superior title or another acting through him. It is clear from the affidavits filed in the cause that neither of the respondents fall within the excepted categories. The declaration sought and reliefs granted is against them. It does not bind the Port-of-Spain Corporation which was not a party to the Notice of Originating Motion and which at the same time is not by any stretch of the imagination an arm of the Central Government. Besides, the respondents and their officers who entered and disturbed the applicant and its members in their enjoyment of the disputed

property were not employees of the Corporation. Nor indeed as the trial judge found (more particularly since this was not challenged) these persons were not acting by or with the authority of the Corporation. This being the true position I consider that, on the facts and on the law, the appeal by the respondents is not a competent one; or put another way - there is no legitimate cause for pursuing their appeal. In the meantime, the applicant's use and enjoyment of the property have been curtailed or hindered if not rendered impossible since 1990. In this connection, reference need only be made to the non functioning of their school, lack of use of their housing facilities, the interference with their opportunity for religious worship and other kindred affairs, together with yet further increase in costs, coupled with yet more time lag before the appeal could, in the normal way, come on for hearing.

For the foregoing reasons, I would make the following Orders and grant the undermentioned consequential reliefs:-

(i) The respondents' application for enlargement of time to file the Record in Civil Appeal No. 37/92 be dismissed with costs.

(ii) The applicant's Notice of Motion filed herein - to dismiss the respondents' appeal in Civil Appeal No. 37/92 be granted and that the said appeal be and is accordingly dismissed and on the terms ordered by the trial judge.