Privy Council Appeal No. 76 of 2002

Auburn Court Limited *Appellant*

v.

(1) The Kingston and Saint Andrew Corporation
The Building Surveyor and
(2) The Town and Country Planning Authority
The Government Town Planner *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 23rd February 2004

Present at the hearing:-

Lord Hope of Craighead
Lord Slynn of Hadley
Lord Hobhouse of Woodborough
Lord Scott of Foscote
Sir Kenneth Keith

*[Delivered by **Lord Hope of Craighead**]*

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1. This is an appeal by Auburn Court Limited ("the appellant") from the decision of the Court of Appeal of Jamaica (Harrison and Panton JJA, Downer JA dissenting) on 31 July 2001 dismissing an appeal from a decision of the Full Court (Wolfe CJ, Ellis and Clarke JJ) on 16 May 1997, with reasons given on 16 February 1998, by which that court dismissed the appellant's motions to quash two notices issued by the Kingston and St Andrew Corporation relating to a building which was being constructed at 15 South Avenue, Kingston.

The facts

2. The appellant is the registered proprietor of the property known as 15 South Avenue, Rest Pen, Kingston, in the Parish of St Andrew ("the premises"). The Council of the Kingston and St

Andrew Corporation ("KSAC") is the building authority for the purposes of the Kingston and St Andrew Building Act ("the Building Act"), as defined by section 2 of that Act. It is also the town and country planning authority for the purposes of the Town and Country Planning Act ("the Planning Act"): see section 3(1) of that Act. The first respondents are the Corporation and the Building Surveyor, who is the Surveyor as defined by section 2 of the Building Act. The second respondents are the town and country planning authority and the Government Town Planner, who is ex officio a member of the planning authority: see section 3(2) of the Planning Act.

3. The appellant is the owner of an apartment building on the premises. This building contains a number of residential units which are let to tenants, mostly foreigners. In 1995 the appellant decided to develop the premises by erecting a new building to serve as a recreation area for the benefit of the occupiers of the apartment building. It was to contain a bowling alley, a games area for table tennis and bathroom facilities. Section 10(1) of the Building Act provides that every person who proposes to erect any building or part thereof shall give notice thereof to the building authority. Section 10(2) provides that every person who shall erect, or begin to erect any such building or part thereof without previously obtaining the written approval of the building authority or, in the case of dispute, of the tribunal of appeal shall be guilty of an offence, besides being ordered to take it down by the court. The carrying out of any building operations on land constitutes "development" within the meaning of section 5 of the Planning Act. Permission to develop land must be granted under Part III of the Planning Act, section 10(1)(d)(ii) of which provides that permission for the development may be granted by the local planning authority. Section 23(1) of the Planning Act empowers the Government Town Planner or the planning authority to serve an enforcement notice on any person who carries out or takes steps to carry out any development of land without the grant of planning permission required in that behalf under Part III.

4. The appellant commenced the construction of the new recreational building without first obtaining written approval for its construction from the building authority and without having obtained the grant of planning permission for the development from the planning authority which was required by Part III of the Planning Act.

5. In or about January 1996 Mr Lorn Whittaker, the Chief Traffic Engineer of the Ministry of Local Government and Works, observed that the new building was under construction. He was aware that there was a proposal for the widening of South Avenue. It occurred to him that the new building might be within the area of the road widening. On 26 February 1996 he wrote to Mr Leslie Gabay, the Deputy Building Surveyor of KSAC and acting Chief City Engineer, pointing out that it was in the reservation to be used for the road widening and enquiring whether a building permit had been issued for its construction. As a result of his intervention on 4 March 1996 the appellant submitted a building application for the erection of the new building to the building authority. No plans were submitted with the application. But the appellant paid the fee of $1,800 which Mr White, who had entered the relevant details on the application form, had assessed as payable.

6. On 25 March 1996 a meeting took place at 15 South Avenue which was attended by Mr Whittaker, Mr White, the appellant's managing director Mr Delbert Perrier and the appellant's consulting engineer Mr Colin Husbands. There is a dispute about what was said at that meeting. Mr White maintains that he advised Mr Perrier to cease work on the building as his application for building and planning permission had not yet been processed or considered. Mr Perrier denies this. He says that Mr White told him that the plans which he delivered to Mr White when he was filling in the application form were approved, and that he was never at any time informed of a proposal to widen South Avenue. On 28 March 1996 the appellant submitted the plans for the building to KSAC.

7. According to Mr White, work on the building continued despite his request that it should be stopped. On 29 April 1996 KSAC in its capacity as the local planning authority served an enforcement notice on the appellant under section 23 of the Planning Act prohibiting it from continuing or carrying out any development or operation on the land and requiring it to restore the land to its condition before the development took place. This notice was signed by Mr White for the chairman of the planning authority. On 5 June 1996 KASC in its capacity as building authority served a notice of irregularity dated 30 May 1996 under section 38 of the Building Act requiring the appellant within 48

hours of service to tear the building down. This notice was signed by Mr White for the Building Surveyor.

8. The notice of irregularity was in these terms:

"Kingston & St Andrew Corporation
Building Authority
Notice Due To Irregularity

Kingston & St Andrew Corporation Building Act section 38

To Delbert Perrier
Managing Director
Auburn Court Limited
15 South Avenue
Kingston 10

NOTICE – that you are hereby required within 48 hours of service Tear Down the Building constructed by you from c.c. blocks, reinforced c.c. columns, c.c. beams and c.c. slab roof consisting of 3,600.0 sq. ft. approx and situate at 15 South Avenue, Rest Pen and which does not conform with The Building Act, Vol 10 revised Laws of Jamaica.

Failure to comply with this Notice will render you liable to prosecution under the Kingston and St Andrew Corporation Act

Date the 30th day on May, 1996

Signed: A. White
Building Surveyor"

9. On 19 June 1996 the appellant's application for building and planning permission was considered at a meeting of the building and planning committee of KASC. After considering the advice of its advisory panel, the committee decided to refuse the application. On 1 July 1996 the appellant was advised that the application had been refused. On 22 August 1996 KSAC in its capacity as the local planning authority informed the appellant that its application for planning permission had been refused and served on it a second enforcement notice under section 23 of the Planning Act.

10. The second enforcement notice was in these terms:

"The Town and Country Planning Act

Contravention of Development Order

Enforcement Notice
(Pursuant to section 23)

To: Delbert Perrier
Auburn Court Limited

Of: 15 South Avenue, Vol 1127 Fol. 105
Kingston 10

Nature of Contravention Notice

1. WHEREAS you have contravened or caused a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966.

   By erecting without permission on the land known as 15 South Avenue registered at Vol. 1127 Folio 105 of the Register Book of Titles, a building comprising ground floor plus one using the existing southern perimeter wall and extending it upwards to from the southern wall of the said building on approximately the position marked X on the plan attached

Prohibition regarding use of land and contravening of conditions

2. You are prohibited from –

   continuing or carrying out any development or operation or using the land in respect of which the notice is issued.

3. YOU ARE HEREBY REQUIRED to take the following steps –

   (i) to cease construction of the building immediately from the date on which this notice takes effect.
   (ii) to demolish the building being constructed within 7 days from the date on which this notice takes effect.
   (iii) to remove from the land all building materials and rubble resulting from the demolition of the building within 10 days from the date on which this notice takes effect.

(iv) to restore the land to its condition before the breach of erecting the building without permission within 14 days from the date on which this notice takes effect.

4. THIS NOTICE TAKES EFFECT, subject to paragraph 5 at the expiration of three (3) days after the date of service.

Appeal

5. If you are aggrieved by this notice you may (pursuant to section 23A of the Act) appeal against the notice to the Appeal Tribunal within 28 days of the service of this notice.

Entry on land of local planning authority

6. If you fail to take steps required by this Notice to be taken (other than the discontinuance of any use of the land) the local planning authority may enter on the land and take those steps and may file a suit in a Resident Magistrate's Court, for the recovery of any expenses reasonably incurred by them in that behalf.

7. TAKE NOTICE THAT IF YOU FAIL to comply with this notice you are liable to prosecution and penalty as follows ...

Dated the 22nd day of August 1996

B Samuels
Government Town Planner"

11. On 18 September 1996 (the letter was incorrectly dated as having been written on 18 August 1996) the appellant wrote to the Appeal Tribunal established under section 22A of and the Fourth Schedule to the Planning Act stating that it was aggrieved by the decision which had led to service of the second enforcement notice and appealing against it. The appeal was listed for hearing on 8 October 1996, but the hearing was adjourned to 30 October 1996 when it was further adjourned to 6 November 1996. On 6 November 1996 the Appeal Tribunal was told that the appellant had applied to the Supreme Court for an order to quash the

enforcement notice. The hearing then was adjourned to await the outcome of that application.

12. Following amendments which were introduced by Law 3 of 1999, appeals by a person aggrieved by the service of an enforcement notice now lie under section 23A of the Act to the Minister responsible for town and country planning. But their Lordships were informed by the learned Solicitor General for the second respondent that the Appeal Tribunal still exists, that matters which were outstanding when the system was changed are still being dealt with by the Tribunal and that, as the appellant's appeal has not been withdrawn, the Tribunal is still in a position to deal with it.

The motions before the Supreme Court

13. The appellant brought two applications before the Supreme Court. In the first (Suit No. M101/1996), which was headed "In the matter of section 38 of the Kingston and St Andrew Building Act", it sought an order of certiorari to quash the notice of irregularity by the Building Surveyor which was served on 30 May 1996 (referred to incorrectly in the motion as dated 22 August 1996) and an order of prohibition against the Building Surveyor from taking any further action on the notice. In the second (Suit No. M102/1996), which was headed "In the matter of section 23 of the Town and Country Planning Act", it sought an order of certiorari to quash the second enforcement notice dated 22 August 1996 and an order of prohibition against the Government Town Planner and/or the planning authority from taking any further action on the enforcement notice.

14. The grounds on which relief was sought in Suit M101/1996 were that the notice of irregularity was issued in breach of the principles of natural justice and unfairly, in that no opportunity was given to the appellant to present a case against the issue of this notice or the refusal of the application for permission to erect the building, that the refusal of permission was arbitrary and/or unreasonable and that the decision was irregular and/or invalid in that the reasons or grounds stated for the refusal were bad in law and there was no evidence to support them.

15. The grounds on which relief was sought in Suit M102/1996 were the same, but with the addition of two other grounds. These were that the second enforcement notice was defective and void in

that it alleged a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966 when no such order exists, and that it was defective, irregular and invalid in that it was not signed by any person or authority empowered by law to issue the notice.

16. By the time the case reached the Court of Appeal some of these arguments were no longer being pursued and there were some new arguments. As summarised by Harrison JA, the arguments in respect of Suit M101/1996 were (1) that the notice of irregularity and the refusal of the appellant's application was in breach of the principles of natural justice, in that the appellant was not given a prior opportunity to be heard, there was no valid reason for its refusal and the applicant had a legitimate expectation that it would have been granted and (2) that the refusal of approval for building permission was invalid in that there was no evidence to support it. In respect of Suit M102/1996 the arguments were (3) the same as in (1) above, (4) that the refusal to give written approval was arbitrary and unreasonable and (5) that the second enforcement notice was void in alleging a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966, which order does not exist.

The grounds of appeal before the Board

17. Mr Codlin, who appeared for the appellant before the Board, presented his argument under three main headings. These were (1) that neither the Full Court nor the Court of Appeal had made any findings on important matters of fact where there was a conflict of evidence, (2) that all three notices, including the first enforcement notice, were defective and void and (3) that there had been a breach of the principles of natural justice in that the appellant had not had an opportunity of being heard when his applications for a building permit and for planning permission were being considered by the building and planning committee of KSAC.

18. These grounds of appeal were, in substance, the same grounds as those on which in the Court of Appeal Downer JA dissented from the decision of the majority.

The factual dispute

19. As has already been noted, there is a conflict between the witnesses as to what took place on 25 March 1996 when Mr White

and Mr Whitaker had a meeting on site with Mr Perrier and Mr Husbands. Mr Codlin sought to develop two points arising from what took place at this meeting in the course of his argument. The first was that neither the Full Court nor the majority in the Court of Appeal had made sufficient findings of fact to resolve this conflict. The second was that, as Downer JA held in his dissenting judgment, Mr White's admission that he filled in the application form and assessed it on the appellant's behalf was sufficient to show that there was misconduct leading to a conflict of interest on his part which tainted the decision of the committee, at a meeting which he attended, to refuse the appellant's application for permission for the development.

20. Their Lordships do not think that there is any substance in either of these arguments. The essence of the dispute as to what was said at the meeting of 25 March 1996 is whether, as Mr Perrier and Mr Husband maintain, they were given an assurance by Mr White that the plans which he had shown them for the development would be approved and that there was no need for the application to be amended to take account of the proposal to widen the roadway in South Avenue. Mr White says, on the other hand, that the reason why he went to the site with Mr Whitaker was to see among other things how the building would conflict with the proposal for road improvement by the widening of South Avenue, and that he advised Mr Perrier to cease work on the building as his application for building and planning permission had not yet been processed or considered by KSAC. In the course of the hearing before the Court of Appeal counsel for the appellant sought leave to adduce fresh evidence on this point. This was in the form of an affidavit from Mr Perrier containing a letter from Mr Whitaker, which appeared to indicate that he had been told by Mr White that the development was approved. The Court of Appeal declined to admit this evidence.

21. There is no evidence that Mr White had been authorised to say that approval either had been or would be given for the development. The power of decision as to whether or not to approve the development was vested by the statutes in the relevant authority. As section 10 of the Building Act makes clear, it is to the building authority that every person who proposes to erect a building must give notice and every person who erects a building without previously having obtained the written approval of the building authority commits an offence. The definition of the

expression "Building Authority" in section 2 of the Act states that it means the Council of KSAC or such other body as may be, by order of the Minster, substituted for KSAC for the purposes of the Act. The question whether planning permission is to be given to develop land is a matter for the Council, which is the local planning authority for the parish as defined by section 3 of the Planning Act, or for the Minister. Mr White was an official of KSAC which, as section 10(2) of the Kingston and St Andrew Corporation Act explains, consists of the Mayor and the Councillors. His function was to advise the Council. It was not his function to take decisions which are to be taken by the Council in terms of the statute.

22. Nor can their Lordships accept, with respect, Downer JA's view that Mr White was guilty of misconduct leading to a conflict of interest when he completed the appellant's application form. What he did was to fill in the relevant details and assess the fee that was payable. None of this was improper. It did not give him an interest in the application which might conflict with his duty to the Council. He was simply helping the appellant to complete the application.

The notices

23. Three notices were served in this case. There were the two enforcement notices served under section 23 of the Planning Act dated 29 April 1996 and 22 August 1996 and the notice of irregularity served under section 38 of the Building Act. Mr Codlin submitted that there were defects in all three notices which were sufficiently material to render them invalid and unenforceable.

24. Their Lordships do not need to dwell on the points which he made about the first enforcement notice. It was not the subject of either of the two suits that were before the Full Court. Downer JA considered this notice and expressed the view that it was null and void due to various irregularities. But the majority did not find it necessary to consider it. They directed their attention instead to the second enforcement notice. That this was the right approach is indicated by the fact that the Council did not take any action against the appellant following service of the first enforcement notice. No doubt this was because the appellant's application for planning permission had yet to be considered by the building and planning committee. It was, in effect, superseded when the second enforcement notice was served.

25. The second enforcement notice did not have the effect of superseding the notice of irregularity which was served under the Building Act. Miss Bennett for the first respondent submitted that any views expressed about the notice of irregularity ought not to affect the outcome, but she accepted that the courts below had considered it. So it will be necessary for their Lordships to deal with the arguments which were directed to that notice. They propose to deal with the notice of irregularity first, and then to proceed to examine the second enforcement notice.

(a) The notice of irregularity

26. This notice was served under section 38 of the Building Act. Its full terms are set out above in para 8. The operative part of it was an order instructing the appellant within 48 hours of service to tear down the building which had been constructed by it at 15 South Avenue.

27. Section 38 of the Building Act provides that a notice may be served under that section in the following cases:

> "If in erecting any building, or in doing any work to, in or upon any building, anything is done contrary to any of the rules or regulations under this Act, or anything required by this Act is omitted to be done, or
>
> in cases where due notice has not been given, if the Surveyor, on surveying or inspecting any building or work, finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the rules or regulations under this Act, or whether anything required by the regulations under this Act has been omitted to be done"

In every such case the Surveyor is required to give to the builder notice in writing:

> "requiring such builder, within forty-eight hours from the date of such notice, to cause anything done contrary to the rules or regulations under this Act to be amended, or to do anything required to be done by this Act but which has been omitted to be done, or to cause so much of any building or

Building Authority; see also regulation 2 of the Kingston and St Andrew Building (Notices and Objections) Regulations 1938 which provides that he must give not less than three and not more than seven days notice to the owner and occupier of every holding adjoining the site of his intention to submit plans under that section. The consequences of his not having obtained the approval of the building authority are set out in section 10(2), which provides:

> "Every person who shall erect, or begin to erect or re-erect, or extend, or cause 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 ... shall be guilty of an offence against this Act, and liable to a penalty not exceeding fifty thousand dollars, besides being ordered by the Court to take down the said building or part thereof, or to alter the same in such a 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."

32. This was not therefore a case where, in terms of the first limb of the opening words of section 38, something was done in the course of erecting the building that was contrary to any of the rules or regulations of the Act or where anything required by the Act in the course of erecting it was omitted to be done. Nor was it a case where it was impossible for the Surveyor to ascertain whether anything had been done contrary to the rules or regulations or had been omitted which was required to be done. It was a case where the work of erecting the building ought not to have been begun at all.

33. The service of a notice on the appellant under section 38 was not only inappropriate in these circumstances. It was a notice which the Surveyor had no power to issue, as neither of the cases described in the opening words of the section had arisen. It must therefore be set aside.

(b) <u>The second enforcement notice</u>

34. This notice was served under section 23 of the Planning Act. Its full terms are set out above in para 10. Paragraph 1 of the notice stated that the appellant has contravened or caused a

work as prevents such Surveyor from ascertaining whether anything has been done or omitted to be done as aforesaid to be to a sufficient extent cut into, laid open or pulled down."

28. Section 39 provides that if the builder makes default in complying with what the notice requires, the Surveyor may apply to the Justice for an order requiring him to comply with the notice, or any of the requisitions that may in his opinion be authorised by the Act, within a time to be named in such order.

29. Mr Codlin submitted that this notice was invalid, for all the reasons given by Downer JA in his dissenting opinion. He said that the notice was defective in point of form, as it should have stated that due notice of the work had not been given to the Surveyor and that it should also have stated what was done that was contrary to the rules or regulations or what it was that was required by regulations under the Act had been omitted to be done. He also said that it had been served out of time, in view of the time limit which had been set for the service of such notices by section 76. The date of Mr White's inspection of the building was 25 March 1996. The latest date for the service of a notice under section 38 was 24 April 1996. It was not served until 5 June 1996.

30. There is however a more fundamental objection to it. The purpose of the group of sections of which section 38 forms part is to ensure that the rules and regulations under the Act are duly observed as work which has the approval of the building authority is carried out. Section 32 provides that it is the duty of the Surveyor from time to time during the progress of any works affected by the rules and regulations and directions of the Act, as often as may be necessary for securing the due observance of such rules and regulations, to survey the building or work placed under his supervision and cause all the rules and regulations under the Act to be duly observed. The machinery for enforcement which section 38 sets out provides the Surveyor with the powers that he needs to ensure that all the building control rules and regulations are observed as the work proceeds.

31. This however is a case where the builder had begun work without previously having obtained the written approval of the building authority. This was a breach of section 10(1) of the Act, which provides that every person who proposes to erect or re-erect any building or any part thereof, shall give notice thereof to the

contravention of the Town and Country Planning (Kingston) Development Order 1966 by erecting the building without planning permission. Paragraph 2 prohibited the appellant from continuing the development. Paragraph 3 required it to take the following four steps:

a. to cease construction of the building immediately from the date on which the notice takes effect;

b. to demolish the building within seven days from that date;

c. to remove all building materials and rubbish resulting from the demolition from the land within ten days from that date; and

d. to restore the land to its condition before the breach within fourteen days from that date.

Paragraph 4 stated that the notice was to take effect, subject to paragraph 5, at the expiration of three days after the date of service. Paragraph 5 stated that if the appellant was aggrieved by the notice it had the right under section 23A of the Act to appeal against it to the Appeal Tribunal within twenty-eight days of the service of the notice.

35. The only grounds on which it was contended in the Court of Appeal that this notice was invalid was that in paragraph 1 of the notice it was alleged that there had been a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966 which did not exist. The year in which the order was brought into force was 1966, but the year in which it was made was 1965. The majority of the Court of Appeal thought that there was nothing in this point. Their Lordships agree. This is a technical objection of the kind that has no place in this area of the law. The mistake in the date was an obvious slip. This can be seen immediately simply by looking at the title of the development order. It is not said that anybody was misled by it. This defect, such as it was, fell far short of depriving the notice of all legal effect and rendering it a nullity.

36. Mr Codlin submitted that the notice was invalid for another reason. Here too he sought to rely on a point made by Downer JA in his dissenting opinion. This was that the date when the notice was to take effect had been wrongly stated in paragraph 4 of the notice to be three days after the date of service. He maintained that in the circumstances of this case the relevant date was the

expiration of twenty-eight days after service. He also drew attention to the fact that the timetable that was set out in the notice appeared to make no allowance for the running of the period of twenty-eight days which were allowed for appealing against the notice to the tribunal under section 23A.

37. Section 23 (3) sets out the date on an enforcement notice takes effect. It provides:

> "Subject to section 23A, an enforcement notice shall take effect –
>
> (a) in the case of the discontinuance of use of land, at the expiration of twenty-eight days after the service thereof;
>
> (b) in any other case, at the expiration of three days after the service thereof."

Section 23A was amended after the date when the notice was served by Law Number 3/2001. It now provides for an appeal to the Minister within fourteen days of the service of the notice. As at the date of the notice it was in these terms:

> "If any person on whom an enforcement notice is served pursuant to section 23 is aggrieved by the notice, he may within twenty-eight days of the service of the notice appeal against the notice to the Tribunal."

38. Mr Codlin's argument was that what the planning authority were seeking to achieve in this case was the discontinuance of a material change in the use of land. He said that the appellant was using the land by erecting a building upon it, so the relevant period for the taking effect of the notice was the period of twenty-eight days referred to in section 23(3)(a). The Act does not say in terms that an enforcement notice served under section 23 has to specify the date on which it is to take effect, although section 23(2) refers to the taking of steps within such period as it may specify. But a notice which fails to state when it is to take effect has been held to be a nullity: see *Burgess v Jarvis* [1952] 2 QB 41. It follows that the notice must also be held a nullity if the period which is stated in the notice is the wrong period. The question is whether that is what was done in this case.

39. Two periods are set out in section 23(3) as alternative dates for the taking effect of the enforcement notice. They maintain the

distinction which is drawn throughout the Act between the carrying out of operations on the land on the one hand and the making of a material change in the use of land on the other. This distinction is clearly stated in section 5(2), which provides:

> "In this Act, unless the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

The distinction appears again in section 23(2) where the contents of an enforcement notice are set out. Among the things that an enforcement notice may require are

> "the discontinuance of any use of land, or the carrying out on land of any building or other operations"

The subsection concludes by saying that the enforcement notice

> "shall state that any person upon whom an enforcement notice is served is prohibited from continuing or carrying out any development or operations or using the land is respect of which the notice is served."

40. There is no doubt that the breach of planning control that the appellant is said to have committed in this case consisted in the carrying out of operations on the land which constituted "development" within the meaning of section 5(2) of the Planning Act. It is true to say that particular activities on land may involve both "operations" and "use". But the general scheme of the legislation is to distinguish between the two concepts. In *Parkes v Secretary of State for the Environment* [1978] 1 WLR 1308, 1311B-C, Lord Denning MR said that the definition in section 22(1) of the Town and Country Planning Act 1971 for England and Wales, which is in substantially the same terms as that in section 5(2) of the Planning Act in this jurisdiction, divides "development" into two halves, and that these two halves were to be found again in other sections of the Act. At p 1311E-F he said:

> "Looking at these various sections it seems to me that in the first half 'operations' comprises activities which result in some physical alteration to the land, which has some degree of permanence to the land itself: whereas in the second half 'use' comprises activities which are done in, alongside or on

the land but do not interfere with the actual physical characteristics of the land."

41. The scheme of the Planning Act which is identified by the definition of "development" in section 5(2) is carried through to section 23(3). The reference to a material change of "use" of land in paragraph (a) of the subsection is a reference to an activity on the land which does not interfere with its permanent characteristics. It must be distinguished from the carrying out of operations on the land, such as the erection of a building on it. The breach of planning control that the enforcement notice was directed to in this case fell into the latter category. The date on which it was to take effect was correctly stated in the notice as the expiration of three days after it had been served.

42. Then there is the question whether the notice was defective because the periods for compliance which were stated in paragraph 3 did not allow for the expiry of the period of twenty-eight days within which the appellant could appeal to the tribunal under section 23A. The answer to this question is to be found in the opening words of section 23(3), which state that that subsection is subject to section 23A. That qualification was reproduced in paragraph 4 of the notice. It stated that the period of three days after the date of service when notice was to take effect was "subject to paragraph 5", in which the right of appeal was set out. It is clearly stated in paragraph 3 that the periods would not start to run until the notice took effect. The effect of the opening words of section 23(3) is that, if an appeal is made to the Tribunal, the running of the period for the taking effect of the enforcement notice is suspended until the appeal has been disposed of. It is true that the period of three days set out in section 23(3)(b) leaves little time for the making of such an appeal. But, if that is a defect, it is inherent in the Act, not in the notice. There has been no suggestion in the present case that it has given rise to any prejudice.

43. There remains the question whether, as Mr Codlin submitted, the notice was defective because it did not say in terms that the effect of an appeal was to suspend the running of the period for compliance until the appeal was disposed of. What the notice did was to include at the beginning of paragraph 4 the words "subject to paragraph 5". That was sufficient to indicate to the appellant that an appeal would have that effect. There was no need for the notice to say any more. Moreover, the appellant cannot say that it

was misled by the notice. It appealed against the notice to the Tribunal within the time limit set by section 23A(1), and its appeal has had the effect of suspending the period for compliance with it as indicated by the opening words of section 23(3).

44. For these reasons their Lordships consider that there is no substance in the arguments which were directed to the validity of the second enforcement notice

Natural Justice

45. The argument under this heading is directed to the events that preceded the service of the second enforcement notice. It will be recalled that it was preceded by a meeting of the building and planning committee of KASC at which the committee decided to refuse the appellant's application for building approval and planning permission for the building which it was erecting at 15 South Avenue. The appellant was not present or represented at that meeting. Mr Codlin said that the fact that the appellant was not given an opportunity to be heard at this meeting was a breach of the principle of natural justice. He referred to the dispute as to what had been said by Mr White at the meeting which took place on site on 25 March 1996. Mr White was present at the meeting. He was not there just as an expert, said Mr Codlin. He was intimately involved in the whole matter. So fairness demanded that before any decision was taken the committee should hear both sides of the argument as to whether, in view of the road-widening proposal, permission should be given for the development.

46. There is no doubt that the principles of natural justice require that before a decision is taken by a tribunal that is acting judicially the person against whom it is taken must be given a fair opportunity of setting out the facts which he thinks are relevant and the arguments on which he relies. But, as Lord Reid observed in *Ridge v Baldwin* [1964] AC 40, 65, attention needs to be paid to the great difference between the various cases in which it has been sought to apply this principle. He elaborated upon this point in *Wiseman v Borneman* [1971] AC 297, 308:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection

> from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

47. The legislation under which the committee were acting in this case does not require the applicant to be present at the meeting at which the decision is to be taken as to whether or not to grant his application. He has, of course, an opportunity to set out his case that permission should be granted in his application. It must be accompanied with plans and such other details as the authority may require. Regulation of the Kingston and St Andrew Building (Notices and Objections) Regulations 1938 provides that a hearing may be held if there are objections to the proposal, at which both sides may appear or be represented. It is obvious that the principle requires that, if an objector is to be heard by the committee, the committee ought to give the applicant an opportunity of being heard also. In a contest of that kind, one side cannot properly be heard without hearing the other.

48. But there were no objections for the committee to consider in this case. The meeting was, of course, attended by officials such as Mr White, whose function it was to provide the advice and information that the committee needed before the decision was taken. The question whether the appellant should be present too and given an opportunity of being heard when that advice was given was at the discretion of the committee.

49. Megarry J set the appellant's argument into its proper context when in *Gaiam v National Association for Mental Health* [1971] Ch 317, 333C he said:

> "... local planning authorities refuse thousands of planning applications each year without giving the applicant any hearing, leaving him to his remedy by way of appeal to the Minister, when a full hearing is given; yet I know of no suggestion that local planning authorities are thereby universally acting in contravention of the principles of natural justice."

As that observation indicates, the question of fairness must be answered by looking to the whole of the procedure which is provided by the statute, including the provision that is made for the applicant to be heard by way of an appeal.

50. Provision is made both in the Building Act and in the Planning Act for an applicant who is aggrieved by a decision taken by the committee to appeal against it. Every person whose plans or drawings have been refused permission by the building authority may appeal to the Tribunal of Appeal under the Kingston and St Andrew Building (Tribunal of Appeal) Regulations 1932. Every person who is aggrieved by an enforcement notice could, as the law stood at the date of the service of the second enforcement notice, appeal to the Tribunal established under the Planning Act under section 23A. There was a further right of appeal under section 23(8) to the Court of Appeal. It has not been suggested that the remedies that were available to the appellant by way of appeal were inadequate.

51. Their Lordships have concluded that, when account is taken of the whole of the procedure which the statutes lay down, including the opportunities for appeal, the rules of natural justice were not breached in this case.

Conclusion

52. Their Lordships respectfully agree with the decision which was arrived at by the majority in the Court of Appeal. Panton JA observed at the outset of his judgment there were only two issues that remained for consideration and determination in that court. These were (a) whether the appellant was entitled to a hearing when the application for planning permission was being considered, and (b) was the second enforcement notice a valid notice. The appellant has failed on both points. He has also failed on the issue as to whether the decisions of the courts below were defective for lack of findings on important matters of fact where there was a conflict of evidence. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal to their Lordships' Board.