IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M101 OF 1996

IN THE MATTER of Section 38 of the Kingston and Saint Andrew Building Act

AND

IN THE MATTER of 15 South Avenue, Registered at Volume 1127 Folio 105 of the Register Book of Titles.

SUIT NO. M102 OF 1996

IN THE MATTER of Section 23 of the Town and Country Planning Act

AND

IN THE MATTER of 15 South Avenue, Registered at Volume 1127 Folio 105 of the Registered Book of Titles.

CORAM: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE ELLIS
THE HONOURABLE MR. JUSTICE CLARKE

Dr. Lloyd Barnett instructed by Rudolph L. Francis for the Applicant
Lennox Campbell, Senior Assistant Attorney General and
Miss Avalano Johnson instructed by the Director of State Proceedings
for the Respondent.

Heard: May 14, 15, 16, 1997 & February 16, 1998.

WOLFE, C.J.

On the 16th day of May, 1997, we dismissed both motions which sought the granting of the Prerogative Orders of Certiorari and Prohibition and promised to put our reasons in writing. That promise is now being fulfilled.

I set out below the terms of the **Motion in Suit M101/1996.**

Auburn Court Limited, the applicant, sought the following:

1. An Order of Certiorari to remove into this Honourable Court and quash a Notice dated August 22, 1996 by the Building Surveyor to Delbert Perrier and the applicant and served on Delbert Perrier to require the applicant "within (48) forty-eight hours of service to pull down the building being constructed by him from c.c. blocks, reinforced c.c. columns, c.c. beams and c.c. slab roof consisting of 3,600.0 sq. ft. approximately and situate at 15 South Avenue, Rest Pen" and the decision dated July 1, 1996 of the Building and Town Planning Committee of the Kingston and St. Andrew Corporation refusing the applicant's application to erect a building at the above-mentioned address; and
2. an Order of Prohibition to prohibit the Building Surveyor and/or the Kingston and St. Andrew Corporation from taking any further action on the said Notice or from taking any steps pursuant thereto.

Suit M102/1996

1. An Order of Certiorari to remove into this Honourable Court and quash a Notice dated August 22, 1996, issued to Delbert Perrier and the applicant and served on Delbert Perrier purporting -

   (a) to prohibit the applicant from continuing or carrying out any development or operation or using the land in respect of which this notice is issued; and

   (b) to require the applicant 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; and

      (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.

2. An Order of Prohibition to prohibit the Government Town Planner and/or the Town and Country Planning Authority from taking any further action on the said Enforcement Notice or from taking any steps pursuant thereto.

The grounds upon which the relief was sought in M101/96 are as follows:

1. The said notice was issued in breach of the principles of natural justice and unfairly in that no opportunity was given to the applicant to present its case against the issue of the said notice or refusal of the said application, particularly as the applicant was advised that the applicant's application for the relevant approval and permission had been granted and/or that there was no reason or no valid reason for the refusal of the application and the applicant had a legitimate expectation that the approval would be granted;
2. the refusal of approval and permission and/or the failure to issue written approval was arbitrary and/or unreasonable and there was no reason or no valid reason therefor; and
3. the said decision is irregular and/or invalid in that the reasons or grounds stated for the refusal are bad in law and there is no evidence to support them.

Grounds M102/1996

Basically the grounds are the same as grounds 1 - 3 in Motion 101/96, in addition to two other grounds, namely, that -

(a) the said notice is defective and void in that it alleges a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966 when no such Order exists;

(b) the said notice is defective, irregular and invalid in that it is not signed by any person or authority empowered by law to issue the said notice.

FACTUAL SITUATION

Delbert Perrier the Managing Director of Auburn Court Ltd. deposes in his affidavit that the company is the registered proprietor of property known as 15 South Avenue in the parish of St. Andrew and registered at Volume 1127 Folio 105 of the Register Book of Titles.

Erected upon the said land is an apartment building containing twelve (12) units of two bedrooms each which are let to tenants, mostly foreigners.

In 1995, the applicant decided to develop the premises by establishing a recreation area to serve the tenants. The proposed recreation area would include -

(i) a small bowling alley

(ii) a games area for table tennis

(iii) bathroom facilities

The applicant consulted with the late Mr. Leslie Gabay, then City Engineer and Mr. A. White, Building Surveyor of the Kingston and St. Andrew Corporation. At this consultation the concern was raised as to whether there was a set back between the boundary of the said property and the existing wall.

A subdivision plan of the site was produced, for inspection by the City Engineer and the Building Surveyor. They consulted with one Mr. Grant, a

Surveyor employed by the Kingston and St. Andrew Corporation, who confirmed there was a set back.

Mr. Perrier asserts that he was assured by the representatives of the Kingston and St. Andrew Corporation that "they had no problem or objection to the proposed development".

As a result of this assurance, no doubt, plans of the proposed development were prepared and submitted to the Kingston and St. Andrew Corporation for building approval and development permission. The site and the plans having been examined, the applicant was advised of the fees payable, which fees were paid on March 4, 1996.

The applicant at paragraph 6 of his affidavit dated November 6, 1996, states as follows, and this to my mind is indeed significant.

> "On the basis of the representations that there was no objection to its plans proceeded to construct the building."

On March 31, 1996, Mr. Colin Husbands, Consulting Engineer, acting on behalf of the applicant made enquiries of the Chief Traffic Engineer in the Ministry of Local Government and Works as to whether there were any proposals for widening South Avenue and was accordingly advised that there was no such proposal.

On February 26, 1996, the Ministry of Local Government and works wrote to the City Engineer to ascertain whether or not there was a building permit for

the construction which was taking place and pointing out that the development fell within the reserved area for future widening of South Avenue.

On April 1, 1996, Colin Husbands wrote to the Chief Building Inspector, challenging the allegation that there was a plan to widen South Avenue. This he contends was confirmed by the relevant Development Order.

There was no response from the Kingston and St. Andrew Corporation and on March 25, 1996, a site meeting was held. Present at that meeting were Mr. Arnold White, acting City Engineer, Mr. L.L. Whittaker, Chief Traffic Engineer, Ministry of Local Government and Works, Mr. Colin Husbands and the applicant.

Two concerns were raised at the meeting -

(i) whether the building was constructed on the boundary of the registered lot, or was there a set back. This set back requirement was necessary for the installation of underground storm water pipes; and

(ii) the status of the construction of the building with respect to approval by the Kingston and St. Andrew Corporation.

The acting City Engineer pointed out to the Chief Traffic Engineer that there was a set back of 2'6" and further stated that the plans were approved and were being processed for collection.

A notice dated August 22, 1996 was served on the applicant on or about August 22, 1996, requiring, inter alia, the demolition of the building which was constructed at a cost of $10,000,000.00.

The applicant appealed against the notice dated August 22, 1996, as well as against the notice dated May 30, 1996.

The notice dated May 30, 1996, was served pursuant to the "Building Act, Volume 10, Revised Law of Jamaica", and required the applicant within 48 hours to pull down the said building on the ground that it "does not conform with the Building Act".

By letter dated July 1, 1996, the applicant was advised that his application to construct the building had been refused by the Kingston and St. Andrew Building and Town Planning Committee on June 19, 1996.

The facts as deposed to by Mr. Delbert Perrier are strenuously challenged by the affidavit evidence of Mr. Arnold White, Deputy Building Surveyor of the Kingston and St. Andrew Corporation, Mrs. Blossom Samuels, Government Town Planner, Mrs. Minette Mitchell, acting Secretary to the Appeal Tribunal, constituted pursuant to the Town and Country Planning Act and Director in charge of Physical Planning and Development Division in the Ministry of Environment and Housing and Mr. Errol Bennett, acting Assistant Town Clerk.

The affidavit evidence of the abovementioned persons will be examined as the grounds, upon which the Order for Certiorari is sought, are discussed.

The grounds will be examined not in chronological order, but in the order in which they were argued.

M101/96 - GROUNDS NO. 3 (1)

> "The said notice was issued in breach of the principles of natural justice and unfairly in that no opportunity was given to the applicant to present its case against the issue of the said notice or refusal of the said application, particularly as the applicant's application for the relevant approval and permission had been granted and/or that there was no reason or no valid reason for the refusal of the application and the applicant had a legitimate expectation that the approval would be granted."

3 (2) "The refusal of approval and permission and/or failure to issue written approval was arbitrary and/or unreasonable and there was no reason or no valid reason therefor."

M102/96

Ground 3 (ii) is similar to Ground 3 (2) of M101/96.

Ground 3 (iii)

> "The said notice is defective and void in that it alleges a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966 when no such Order exists."

The above grounds were argued together and are concerned with the validity of the reasons stated for the refusal of permission.

The applicant contends that initially the concern which was raised in the discussions with the Kingston and St. Andrew Corporation and Ministry of Environment and Housing Staff related to the 'SET BACK'.

Subsequent to those discussions the Entities reversed their position and raised issues, which may be described as "incompatibility with the characteristics of the neighbourhood", "unsuitability of the class, type and design to the locality" and a conflict with "a road widening proposal".

The applicant urged that this change of position was occasioned by the intervention of the Ministry of Environment and Housing which raised the question of the road widening proposal. This he contended caused a change in the attitude of the Kingston and St. Andrew Corporation Officials and resulted in the subsequent decisions and notices.

In examining the legality of the ground for refusal there are two relevant statutory positions to be considered, to wit,

(i) The Kingston and St. Andrew Building Act

(ii) The Town and Country Planning Act.

Re: the K.S.A.C. Building Act

Section 7 of the Kingston and St. Andrew Building Act stipulates as follows:

> "No house or building shall be constructed or begin to be constructed and no house or building shall be extended or begun to be extended, in such manner that the external wall or front of any such house or building, or if there be a forecourt or other space left in front of any such house or building the external fence or boundary of such forecourt or other space, shall be at a distance less than the prescribed distance from the centre of the roadway of any road, street lane or way, without the consent in writing of the Corporation. (Emphasis mine). Provided always that the Corporation may, in any case where it may think it

> expedient, consent to the construction, formation or extension, of any house, building, forecourt or space, at a distance less than the prescribed distance from the centre of the road way of any such road, street, lane or way, and at such distance from the centre of such roadway and subject to such conditions and terms (if any) as they may think proper to sanction."

It is clear from the provisions of this section that the prescribed distance must be from the centre of the roadway and not from the edge thereof. It is also clear that the Corporation may permit a variation to the prescribed distance by reducing same.

By virtue of section 8 of the said Act, the Corporation may require the owner or occupier to "set back" the building so that the external wall, etc. does not violate the provisions of section 7, as to the prescribed distance.

Section 8

> "In every case where any such house, building, forecourt or space is constructed, formed or extended, or has begun to be constructed, formed or extended, in contravention of the provisions of section 7, at a distance from the centre of the roadway of any such road, street, lane or way, as aforesaid less than the prescribed distance, or than such other distance as may have been sanctioned by the Corporation, or contrary to the conditions and terms (if any) subject to which such sanction was obtained, the Corporation may serve a notice upon the owner or occupier of the said house, building, forecourt or space, or any part thereof, to be set back so that the external fence or wall of such house or building or the external fence or boundary of such forecourt or space, shall be at a distance not less than the prescribed distance from the centre of the roadway of such road, street, lane or way as aforesaid, or at such distance and according to such conditions and terms (if any) as the Corporation may have sanctioned."

Dr. Barnett argued that there is no provision in the Act which authorises the Corporation to require a set back from the EDGE of the road way or permits the Corporation to serve a notice upon any owner or occupier for failing to comply with such requirement.

Section 25 of the Act prescribes as follows:

> "25 (1)(a). "The Building Authority may, from time to time alter or amend the regulations contained in the First and Second Schedules, and may also from time to time make such further regulations, as they may deem expedient, for better carrying into effect the objects and powers of this Act, with respect to all or any of the following matters, that is to say -
>
> (a) the minimum distance between buildings and the edge of the roadway;"

Worthy of note, is the fact that the Regulations contained in the First and Second Schedule to the Act, do not stipulate any minimum distance between a building and the edge of the roadway.

Dr. Barnett submitted that the Kingston and St. Andrew Building Act does not permit the Kingston and St. Andrew Corporation to exercise its powers in respect of proposed road development nor does it authorise the Corporation to prescribe road reservations. The provisions as to road reservations can only be made under the town Planning Act.

The mechanism for giving effect to the Town and Country Planning Act, urges Dr. Barnett, is via development orders. See section 5(1) which enacts as follows:

> "The Authority may after consultation with any local authority concerned prepare so many or such

> provisional development orders as the Authority may consider necessary in relation to any land, in any urban or rural area, whether there are or are not buildings thereon, with the general object of controlling the development of land comprised in the area to which respective order applies, 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."

Subsection 2 defines the meaning of "development" and from the definition there can be no doubt that the offending building constituted a development within the meaning of the Act. Indeed, there was no argument to the contrary by the applicant.

Section 7 of the Town and Country Planning Act which deals with the confirmation of provisional development orders states:

> "(1) So soon as may be after the expiration of the period during which notice of objection to any provisional development order may be given under section 6, the Authority shall transmit such order and any objection made to such order under section 6 and the comments of the Authority upon such objection (if any) to the Minister.
>
> (2) Where the Minister is satisfied that the implementation of any provisional development order is likely to be in the public interest he may by notification published in the Gazette, confirm it with or without modification and thereupon such order with or without modification shall come into operation as a confirmed development order.
>
> (3) Every notification under subsection (2) shall also be published in a local daily newspaper at least once in each of two successive weeks."

Under Part III of the said Act, section 10 makes provision as to the contents of the development order.

In accordance with the provision of the Act, the Town and Country Planning (Kingston) (Confirmed) Development Order, 1965 was published in the Jamaica Gazette Supplement dated Friday, July 22, 1966. The Schedule to this Development Order at pages 501 - 508 sets out a schedule of road width reservations for existing roads in the Corporate Area of Kingston and St. Andrew (Appendix 1). South Avenue, the location of the offending building is not listed.

In the light of the above Dr. Barnett submitted that reliance upon the proposed road development which is unprescribed and unpublished, in accordance with the statutory regime governing development orders, is fatal in that it is contrary to the scheme of things and therefore, ultra vires and void.

In further support of his arguments, as to the validity of the reasons given for the refusal of permission to build, Dr. Barnett referred to the affidavit evidence of Collin Husbands, consulting engineer to Auburn Court Ltd. and Delbert Perrier. In his affidavit Mr. Husbands avers that at meetings with officers of the Kingston and St. Andrew Corporation both on site and off site it was accepted that the proposed building did not infringe the Building Regulations.

Exhibit C.H. 1, a letter dated February 26, 1996, addressed to the Chief City Engineer, Mr. Leslie Gabay, by Mr. Lorn Whittaker, Chief Traffic Engineer,

alludes to the Waterloo/West King's House Road Project and observes that a building under construction along South Avenue -

> "is very near to the intersection with Waterloo Road and uses the boundary wall on South Avenue as part of this building."

The letter requests the K.S.A.C. to investigate whether a "Building Permit" was issued to this parcel and why the building is in the reservation to be used on future widening of South Avenue.

Paragraph five (5) of the letter discloses, says Dr. Barnett, that the design of the development had then not been finalized and also that the Development Order had not been published in accordance with the Statutory Provisions of the Town and Country Planning Act. It was further submitted that there was no evidential basis to ground a finding of unsuitability.

Mr. Campbell for the respondent submitted that the reasons proffered for the refusal were valid and this, he says, is evident from the provisions of the Acts. He cited a number of sections under the Town and Country Planning Act and the Kingston and St. Andrew Building Act, but it is my considered opinion that the sections relied on do not assist in determining the validity of the reasons given for the refusal.

The Affidavits of Arnold White and Blossom Samuels, Deputy Building Inspector, Government Town Planner, respectively disclosed that no application was made for permission to develop the land, subject matter of this motion.

The relevant law governing development of land is to be found in the Kingston and St. Andrew Building Act and the Town and Country Planning Act.

The Kingston and St. Andrew Building Act, section 10(2) provides as follows:

> "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 . . . . . shall be guilty of an offence against this Act . . . ."
> (emphasis mine)

Section 11(1) of the Town and Country Planning Act states:

> "Subject to the provisions of this section and section 12, where application is made to a local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto, and to any other material considerations."
> (emphasis mine)

Both statutes provide that permission to develop the land must first be obtained before any development is undertaken.

The Enforcement Notice issued pursuant to section 23 of the Town and Country Planning Act, states categorically that the erection of the building at 15 South Avenue was without permission.

By letter dated July 1, 1996, the following reasons were proffered for refusing the application:

1. "That the development is incompatible with the character of the neighbourhood."

2. "That the Class, Type and Design is unsuitable to the locality."

These are findings of fact. Certiorari in these circumstances will only lie if there is no evidence to support these factual findings. There is no submission that there is no evidence to support the findings, rather, the submission is that the reasons given are invalid.

I find the submission untenable in the light of the affidavits filed by the applicant and respondent. The findings are amply supported by the affidavit evidence of Blossom Samuels and Arnold White.

Ground 3(1), (3(i))

M101/96 and M102/96 respectively

> "The said notice was issued in breach of the principles of natural justice and unfairly in that no opportunity was given to the applicant to present its case against the issue of the said notice or refusal of the said application, particularly as the applicant was advised that the applicant's application for the relevant approval and permission had been granted and/or there was no reason or no valid reason for refusal of the application and the applicant had a legitimate expectation that the approval would be granted."

Dr. Barnett submitted that the relevant authorities failed to act fairly, in that during the discussion with Colin Husbands, the architect of the applicant, and the applicant himself, it was disclosed that they were taking into account an

unpublished proposal to make drastic alteration to the alignment of South Avenue.

Further, the respondents did not afford the applicant an opportunity to deal with any concerns relating to suitability of the design or the other factors mentioned in the notice of decision.

The applicant, it is submitted, was led to believe that he was only required to show that the plans were otherwise in order.

Paragraphs 4 - 7 of the applicant's affidavit, dated November 6, 1996, were relied upon in support of this submission. I therefore set out the relevant paragraphs.

> "4. In pursuance of the said decision, acting on the applicant's behalf, I had meetings with the late Mr. L. Gabay, the City Engineer and Mr. A. White, Building Surveyor of the Kingston and St. Andrew Corporation and the only concern raised was as to whether there was a set-back between the boundary of the said property and the existing wall.
>
> 5. I showed Mr. Gabay and Mr. White a sub-division plan of the site and they consulted with Mr. Grant, a Surveyor employed by KSAC, who confirmed that there was a set-back and I was then assured by the representatives of the KSAC that they had no problem or objection to the proposed development.
>
> 6. The applicant had plans and drawing prepared and submitted to the KSAC for building approval and development permission and these and the site were examined and the applicant advised of the amount of fees payable and the applicant on the basis of the representations that there was no objection to its plans proceeded to construct the building. The assessed fee was paid on March 4, 1996. A copy of the Receipt evidencing the payment is now produced and shown me marked D.P.1.

> 7. On or about the 31st March 1996 Mr. Colin Husbands, the applicant's consulting engineer, made enquiries on behalf of the applicant to the Chief Traffic Engineer in the Ministry of Local Government and Works as to whether there were any proposals for widening South Avenue and was told there were no such proposals. It is noticeable that buildings have been constructed along South Avenue in similar positions to the subject building."

Dr. Barnett urged that the conduct of the respondent's officers, who attended at the site and engaged in the preliminary discussions gave rise to a legitimate expectation, on the part of the applicant, that approval would not be denied without giving him an opportunity to respond to any concerns which they had in addition to the issue of the "set back" which had been fully discussed.

Mr. Campbell submitted that the relevant legislation, namely, the Kingston and St. Andrew Building Act and the Town and Country Planning Act provided to the applicant no right to be heard before the issuance of the notice. I agree with that submission. Sections 38 and 23 (1) and (2) of the Kingston and St. Andrew Building Act and the Town and Country Planning Act deal with the giving of notice where there is a breach or likely breach of the legislation. None of the legislation requires any hearing before the giving of such notice. In particular, section 23A (1) states:

> "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."

The right of hearing is afforded if the party is aggrieved by the notice. It might very will be that when the notice is served the party accepts that he is in breach. In which case no prior hearing would be necessary.

I am of the view that the applicant can place no reliance upon anything which might have been said by the officers re the grant of permission. The statutes require that permission be sought prior to the commencement of the development. Further, the decision, as to whether or not to grant an application to develop land or to build, is that of the proper authority and not of any officer employed to such body. (See section 16 of the Kingston and St. Andrew Building Act).

It is for this reason that I hold that the doctrine of legitimate expectation has no application herein. The case of ***Council of Civil Service Unions and Others v. Minister For the Civil Service [1985] 1 A.C. 374*** is readily distinguishable from the instant case. In the cited case the workers - "had been permitted to belong to national trade unions. There was a well established practice of consultation between the official and trade union sides about important alterations in the terms and conditions of service of the staff". It would therefore be reasonable to expect that any change of this well established practice, would be after consultation between the parties.

In the instant case the applicant has admittedly breached the statute by not applying for permission prior to building or developing the land. There was no need for consultation prior to the service of the notice.

There was no understanding between himself and the decision making authorities which could lead him to reasonably expect that he would be consulted before notice was served upon him for any breach which he might have committed.

Also cited was the case of ***Regina v. Secretary of States for the Home Department, Ex Parte Asif Mahmood Khan 1984 1 WLR P. 1337.***

Again this decision offers the applicant no haven of hope. The letter from the Home Office set out certain conditions under which a child would be allowed into the United Kingdom for adoption. The applicant met those conditions but his application was refused without his being given a chance to be heard. In those circumstances, it was reasonable to expect that a hearing would have been afforded him prior to dismissal of his application.

In the instant case there was no such assurance or undertaking.

GROUND

3 (2) - M101/96

> "The refusal of approval and permission and/or the failure to issue written approval was arbitrary and or unreasonable and there was no reason or no valid reason therefor and the said decision is void in that it was not issued by the proper authority and within the time or in the manner prescribed by law."

3 (3) - M101/96

> "The said decision is irregular and/or invalid in that the reasons or grounds stated for the refusal are bad in law and there is no evidence to support them."

3 (iii) - M102/96

> "The said notice is defective and void in that it alleges a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966 when no such order exists."

3 (iv) - M102/96

> "The said notice is defective, irregular and invalid in that it is not signed by any person or authority empowered by law to issue the said notice and the said notice of decision and or enforcement are invalid in that the said notice were not issued within the time or the manner prescribed by law."

Defective Notices

Re the first notice

The first notice of irregularity was dated 1st May, 1956, under the Kingston and St. Andrew Building Act, pursuant to sections 38 and 76.

Section 38 stipulates as follows:

In the following cases that is to say -

> "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 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 shall give to the builder engaged in erecting such building, or in doing such work, 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 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."

Section 76 enacts as follows:

> "In cases where any building has been erected or work done without due notice being given to the surveyor, the surveyor may, at any time within one month after he has discovered that such building has been erected or work done enter the premises for the purpose of seeing that the regulations of this Act have been complied with; and the time during which the surveyor may take any proceeding, or do anything authorised or required by this Act to be done by him in respect of such building or work, shall begin to run from the date of his discovering that such building has been erected or work done."

Section 2 of the Act defines "builder" as -

> "the person who is employed to build or to execute work on a building or structure or, where no person is so employed, the owner of the building or structure."

Dr. Barnett submitted that in respect of this notice it is defective in the following respects:

(a) Arnold White the Deputy Building Surveyor knew of the erection of the building from February 1996 and therefore, in accordance with section 76 steps had to be taken by the surveyor within one month thereof.

(b) Notice was issued on May 31, 1996, to Delbert Perrier, Managing Director of Auburn Court Ltd. and not to the builder or owner.

(c) The notice did not specify the reasons for the decision.

The affidavit of Arnold White indicates that by letter dated 26th February 1996, certain questions were addressed to the City Engineer by Lorn L. Whittaker, Chief Traffic Engineer re the building in question. There is no positive evidence as to when the letter was actually received. Assuming it was received on the date which the letter bares the entry upon the premises would have been within the month stipulated by section 76 to wit, March 25, 1996.

Secondly, Auburn Court Ltd. is a Limited liability company. Service of the notice would therefore have to be effected upon one of the officers of the company or upon the builder. The affidavits disclose that Mr. Delbert Perrier, who describes himself as Managing Director of the company and a builder has always represented the company in the discussions with officers of the Town Planning Authority and the Building Authority.

It must be conceded that the irregularity notice dated May 30, 1996, did not particularize the reasons for the notice. It merely stated that the building "does not conform with the Building Act, Volume 10, Revised Laws of Jamaica".

However, this is a case in which the building was being erected without permission and even after service of the notice the work continued. The applicant showed a blatant disregard for the rule of law. Although the notice

did not specifically set out the reasons the applicant well knew from the site discussions which he had with the officers of the authorised agencies the reason for the issuance of the notice.

It was further submitted that the notice of refusal dated July 1, 1996, stated that the application was considered by the Building and Town Planning Committee of the Kingston and St. Andrew Corporation. This, it is contended, is in breach of the statutes as the statutes define "Building Authority" and Local Planning Authority to mean the **Council** of Kingston and St. Andrew Corporation. The Building and Town Planning Committee acts on behalf of the Council of the Kingston and St. Andrew Corporation. It is well known that the Council operates in committees.

Dr. Barnett complains that the Enforcement Order cites 1966, whereas the Order was enacted in 1965 and therefore the notice is defective. The Town and Country Planning (Kingston) (Confirmed) Development Order, 1965 was published in the Jamaica Gazette Supplement, Proclamations, Rules and regulations of Friday, July 1996. This error, I would regard as de minimis. Notwithstanding the error in the year there cannot be any doubt what legislation was being referred to.

That paragraph 5 of the notice does not conform with the prescribed form of notification does not in my view invalidate the notice. The omission goes to mere form. No prejudice has been occasioned to the applicant.

The orders sought, to wit, Certiorari and Prohibition are discretionary remedies. Even where a person may be awarded a certiorari ex debito justitiae the Court retains a discretion to refuse his application, if his conduct has been such as to disentitle him to relief. The Court is entitled to have regard generally to the conduct of the applicant and to the special circumstances of the case in deciding whether to grant him the remedy he seeks.

In the instant case the applicant was served a notice to cease building, in that he had no permission so to do. He deliberately refused to obey the lawful order of the prescribed authorities. His conduct, if I may borrow the words of ***Singleton L.J. in Exparte Fry [1954] 1 W.L.R. (CA) 730*** at p. 735 -

"was extra-ordinarily foolish."

The discretion of the Court ought not to be exercised in the favour of one who has behaved so unreasonably. This type of conduct militates against the development of a well organised society and makes governance extremely difficult.

Persons who flout the law so flagrantly must not expect the Court to come to their aid. The Court takes judical notice of the number of persons prosecuted in the Courts of the island for erecting buildings without first obtaining permission so to do.

This kind of disregard for the law has had the effect of ruining many neighbourhoods causing extensive economic loss to owners of property.

It is for the reasons contained herein that I concurred in dismissing the motions seeking Orders of Certiorari and Prohibition.

ELLIS, J

I have read the Judgment of the learned Chief Justice. The Judgment is all embracing and I have nothing to add.

CLARKE, J.

I have read the Judgment of the Learned Chief Justice. I agree with his reasoning and the conclusions he has arrived at.