JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 33 OF 2004

BEFORE: THE HONOURABLE MR. JUSTICE SMITH, J.A.
THE HONOURABLE MR. JUSTICE COOKE, J.A.
THE HONOURABLE MRS. JUSTICE HARRIS, J.A.

BETWEEN:	BEST BUDS LIMITED	APPELLANT
AND	THE MINISTRY OF LAND AND ENVIRONMENT	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT
AND	THE KINGSTON AND ST. ANDREW CORPORATION	3RD RESPONDENT

Miss Audre' Reynolds instructed by Patrick Bailey & Co. for the appellant

Mrs. Symone Mayhew & Miss Kalaycia Clarke, instructed by the Director of State Proceedings for the 1st & 2nd respondents

Miss Rose Bennett & Mrs. Crislyn Beecher-Bravo, instructed by Bennett & Beecher-Bravo for the 3rd respondent

October 31, November 1, 2, 3, 9, & 10, 2006 and December 14, 2007

SMITH, J.A:

I have read in draft the judgment of Hazel Harris, J.A. and I agree with her conclusions and the reasons therefor.

COOKE, J.A:

I have read in draft the judgment of Harris, J.A. I agree with her reasons and conclusions and there is nothing that I wish to add.

HARRIS, J.A:

This is an appeal by the appellant against a decision of the Minister of Land and Environment, dismissing the appellant's appeal against an Enforcement Notice with respect to property known as 11 Fairway Avenue in the parish of Saint Andrew.

The appellant has been in occupation of 11 Fairway Avenue by virtue of a five year lease, with an option to purchase, granted to them on December 1, 2001 by Richard Reese, agent of the registered proprietors Vernon and Myrtle Reese. These lands are comprised in Certificates of Title registered at Volume 255 Folio 97 and Volume 300 Folio 78.

On the leased property were a plant nursery and a flower shop operated by the appellant in contravention of section 23 of the Town and Country Planning (Kingston Confirmed) Development Order 1965 pursuant to section 23 of the Town and Country Planning Act.

On March 19, 2002 the Kingston and Saint Andrew Corporation wrote to the appellant about its unauthorized use of the property and requested a discontinuance of the unauthorized usage.

On June 5, 2002 an Enforcement Notice dated May 20, 2002 was served on Mr. Lennox Brooks, the appellant's managing director, requiring the appellant to do the following within 10 days of service of the Notice:

> "A. DISCONTINUE THE OPERATION OF A COMMERCIAL ENTERPRISE and/or
> B. DISCONTINUE THE OPERATION OF A PLANT NURSERY and/or
> C. DISCONTINUE THE OPERATION OF A SHOP and/or
> D. DISCONTINUE THE UNAUTHORIZED USE OF THE BUILDING AND/OR LAND
> E. REMOVE ALL MACHINERY AND EQUIPMENT ASSOCIATED WITH THE DEVELOPMENT
> F. RESTORE THE BUILDING AND/OR LAND TO ITS CONDITION BEFORE THE DEVELOPMENT TOOK PLACE"

A stop notice dated May 20, 2002 was also served on the appellant's managing director on June 5, 2002. This notice directed the appellant to discontinue development of the property with immediate effect. The directive related to the cessation of the appellant's "operation of a commercial enterprise and/or operation of a plant nursery and/or operation of a shop and/or change in use of a residential building and/or land". The development, the Notice outlined, was in operation without the requisite planning permission.

Copies of the enforcement notices, addressed to Vernon Bygrave Reese and Myrtle Reese, the registered proprietors of the property, were left on the premises on June 5, 2002.

By letter dated June 7, 2002 the appellant appealed to the Minister of Land and Environment. In a letter dated July 21, 2003 under the hand of the Permanent Secretary of the Ministry of Land and Environment, the appellant was informed that the Minister appointed an Appeals Committee to hear their appeal and make recommendations to him.

On February 10, 2004 the Committee heard the appeal and submitted their recommendation to the Minister. On March 1, 2004 the Minister wrote to the appellant's attorneys-at-law informing them as follows:

> "I write pertaining to captioned Appeal that was heard on Tuesday, February 10, 2004 by the Appeals Committee appointed by me under the Town and Country Planning Act. After careful consideration of the information presented by all parties and the recommendation of the Appeals Tribunal, I am convinced that the Kingston and St. Andrew Corporation was justified in taking Enforcement action against the appellant. Under and pursuant to the Town and Country Planning Act and the Kingston Development Order, where premises fall within an area that is zoned for a particular use, the premises must be used only for the purpose zoned; any other use is unlawful where approval of the Local Planning Authority has not been obtained.
> I have therefore decided that the Enforcement Notice be upheld and all the requirement of same be adhered to."

The appellant now appeals against that decision.

The following amended grounds of appeal were filed:

> "(1) The Minister erred in law in allowing his decision to be fettered by that of the

Commission appointed to hear the evidence in this matter, instead of hearing and determining the matter himself, as evidenced by his letter dated the 1st day of March 2004.

(2) Further and/or alternatively, the Minister acting through the Tribunal appointed pursuant to section 28A of the said Town and Country Planning Act, erred in law in failing to exercise their discretion, and/or fettering their said discretion granted within section 23A (4) of the said Town and Country Planning Act in granting a variation of the said Enforcement Notice as the requirements of the said notice exceeded what was necessary for restoring the land to its condition before the said development took place.

(3) The Minister erred as a matter of fact and/or law in failing to give any and/or any proper consideration to the current usage of the properties in the area, which constitutes a recognizable change of use as demonstrated by the fact that of thirty (30) lots on Windsor Avenue, fourteen (14) are commercial in nature; eleven (11) are dwelling houses; and five (5) are residential/commercial; and of the sixteen (16) other lots on Fairway; six (6) are dwelling houses, six (6) are commercial in nature, two (2) are residential/commercial, there are two (2)(empty lots.

(4) The refusal to grant a reclassification of zone was arbitrary and unreasonable.

(5) No findings of fact were given."

Grounds 3-5 were abandoned.

The appellant sought and obtained leave to argue two supplemental grounds. These are:

> "(6) That the Enforcement Notice be quashed for the fatal procedural irregularity of failure to serve the owners of the property situated at 11 Fairway Avenue, Kingston 5.
>
> (7) Alternatively, that the Minister's decision in upholding the Enforcement Notice against the Appellant be quashed for the fatal procedural irregularity in the failure to serve and/or hear the owners of the property situated at 11 Fairway Avenue, Kingston 5".

These supplemental grounds were argued first.

Miss Reynolds argued that neither the registered proprietor of the property nor their agent was served with the enforcement notice, or any other notice. The enforcement notice, she submitted, was addressed to the appellant, the occupier of the premises notwithstanding that such notice must be served on both owner and occupier in obedience to section 23(1) of the Town and Country Planning Act. The non-service on the owners, she contended, rendered the enforcement notice null and void.

It was Mrs. Mayhew's submission that the owners were in fact served. She further submitted that the appellant's complaint of non-

service on them (the appellant), is baseless as service had been effected on them. It was unnecessary, she contended, for the Committee to have made inquiry into service on the owners, as, the Committee's appointment was with respect to the appeal of the occupier of the property (the appellant).

Section 22A of the Town and Country Planning Act makes provision for the service of a stop notice, requiring a party to terminate an unauthorized development. The section reads:

> "22A.–(1) Where it appears to a local planning authority, the Government Town Planner or the Authority that a development specified in subsection (2) is unauthorized or is hazardous or otherwise dangerous to the public, the local planning authority, the Government Town Planner or the Authority, as the case may be, shall serve or cause to be served on any of the persons specified in subsection (3), a stop notice requiring that person to immediately cease the development.
>
> (2) A development referred to in subsection (1) is a development -
>
> (a) which is being carried out in breach of a condition subject to which planning permission was granted; or
> (b) which is being carried out without the grant of planning permission.
>
> (3) The persons on whom a stop notice may be served are -
>
> (a) the owner or occupier of the land whereon the development is

taking place or has taken place; or

(b) any person who is engaged in the development; or

(c) any other person appearing to have an interest in the land."

Section 23 provides, inter alia, for the service of an enforcement notice on both the owner and occupier of the affected land. Sections 23(1) and 23 1(A) state:

"23.-(1) If it appears to the local planning authority, the Government Town Planner or the Authority that any development of land has been carried out after the coming into operation of a development order relating to such land without the grant of permission required in that behalf under Part III, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then subject to any directions given by the Minister and to subsection (1A), the local planning authority, the Government Town Planner or the Authority may within twelve years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development order and to any other material considerations, serve on the owner and occupier of the land and any person who carries out or takes steps to carry out any development of such land and any other person concerned in the preparation of the development plans or the management of the development or operations on such land a notice under this section (hereinafter referred to as an "enforcement notice").

"23 - (1A) Where a stop notice is served under section 22A, a local planning authority, the Government Town Planner or the authority, as

> the case may be, shall serve an enforcement notice within fourteen days of the service of the stop notice."

A stop notice issued under section 22 A (1) of the Town and Country Planning Act, may, by virtue of section 22A (1) (3)(a) of the Act, be served on either the owner or occupier of the property upon which unauthorized development takes place. Such service should occur 14 days prior to the service of an enforcement notice.

However, the stop notice was served on the appellant, the occupier, on June 5, 2002 the very day of the receipt of the enforcement notice by them. The service of the stop notice is a condition precedent to the service of the enforcement notice. There ought to have been adherence to the requirement of section 23 (1A) of the Act. Although this procedural defect as to service exists, I am inclined to think that the defect would not in itself vitiate service of the enforcement notice on the appellant.

The important issue is as to the true construction of section 23 (1) of the Act. The crucial question is whether service of the enforcement notice on the appellant was effective. Miss Reynolds maintained that the requisite service was lacking. In support of this contention she cited the cases of ***Bambury and Others v Linden Borough of Hounslow and Another*** [1966] 2 ALL E.R. 532 and ***Courtney–Southam v Crawley Urban District Council*** [1967] 2 ALL ER 246. These cases concern the service of

enforcement notices under section 45 of the English Town and Country Planning Act 1962 which mandates the local authority to serve enforcement notices on both owner and occupier of property .

In ***Bambury and Others v London Borough of Hounslow and Another*** (supra) enforcement notices were served on three occupiers of land who were not the owners. The notices were served on the occupiers on the same date. However, the owner was served on a subsequent date. The service of the notices on the occupiers was quashed by reason of the service on the owner and occupiers coming into effect at different times.

The instant case is distinguishable from ***Bambury and Others v London Borough of Hounslow and Another*** (supra). In the present case the issue is not with reference to service being effected on different dates, so as to render service ineffectual. The question is whether the owners were in fact served with the relevant notice.

In ***Courtney-Southan v Crawley Urban District Council*** (supra) the appellant made an application to the respondent for planning permission to use certain lands owned by his wife for the purpose of storing cars. These lands were jointly occupied by both the appellant and his wife. The appellant was served with an enforcement notice addressed to him as owner. Both parties ought to have been served. The wife who should have also been served, was not. The appellant continued to use the land for the storage of cars despite the refusal of planning permission to

do so. He was convicted for non-compliance with the enforcement notice. On appeal, the conviction was quashed as it was held that service of the enforcement notice on the appellant was not service on the owner and the non-service on the owner of the land rendered the enforcement notice ineffectual.

It is ordained by section 23 of the Town and Country Planning Act that both the owner and occupier of the land must be served with an enforcement notice. Proof of service of the relevant notice on Mr. and Mrs. Reese is paramount.

It was urged on us by Miss Bennett that the enforcement notice came to their attention and the issue of non-service of the notices was not raised before the Committee by their agent. I must, without reservation, state that I am constrained to disagree with this submission. The submission clearly offends a cardinal evidentiary rule, in that, it casts the burden of proof of service of the notice, on the appellant. It was the duty of the respondents to demonstrate that the owners had been served and not for the owners to prove want of service.

Presumably, the enforcement notice had been brought to the Reeses' attention. It is true that their agent did not raise the matter of the 1st respondent's failure to serve the owners. However, the agent's participation in the appeal process would in no way lend support to the

argument that the owners were duly served. It is obligatory on the part of the respondents to establish that this was indeed so.

Miss Mayhew argued that in light of the provisions of section 30 of the Town and Country Planning Act, the owners were in fact served, although not personally.

The procedure governing the service of Notices issued under the Act is outlined in section 30. It provides:

> "30. Any notice, order or other document required or authorized to be served under this Act may be served either –
>
> (a) by delivering it to the person on whom it is to be served; or
>
> (b) by leaving it at the usual or last known place of abode of that person; or
>
> (c) by sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode where such place of abode is within a postal delivery district; or
>
> (d) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at their registered or principal office or sending it in a prepaid letter addressed to the secretary or clerk of the company or body at that office; or
>
> (e) if it is not practicable after reasonable enquiry to ascertain the name or address of any person on whom it should be served, by

> addressing it to him by the description of "owner" or "lessee" or "occupier" (as the case may be) of the premises (naming them) to which it relates, and by **delivering it to some person on the premises or,** if there is no person on the premises to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous part of the premises".

Service of the enforcement notices on the owner and occupier of premises is a mandatory requirement of section 23 (1) of the Town and Country Planning Act. Under section 24 (3) of the Town and Country Planning Act continued user of the land in contravention of section 22A (1) of the Act, without permission, after an enforcement notice has been served, carries with it, criminal sanctions. Such sanctions may be imposed on the user of the property or the person who causes it to be used. The owners of the land, having permitted it to be utilized for unauthorized purposes could be subject to criminal liability. Parliament knowing that the owners would be exposed to criminal sanctions for unauthorized use of property, must have intended that the issuance of any enforcement notice must be brought to the knowledge of the owners by service upon them.

The fact that the statutory provision specially stipulates that service of the notice must be effected on both owner and occupier, it must have been the intention and in the contemplation of the framers of the statute, that, the enforcement notice, to be effective, must be served on both

parties. It would have been the legislative intent that an enforcement notice, in order to attain validity and enforceability, must be served on both owner and occupier of property. To state otherwise would be contrary to the letter and spirit of the statute.

There is no evidence to show that the owners were served notwithstanding counsel's submission that they were inmately served with the notices. The address of the Reeses was known. Notices of enforcement were exhibited to an affidavit of Rollin Alveranga, Senior Director in Policy Planning and Standard Division of the Ministry of Local Government and Environment, showing their address to be 2 Richings Avenue, Kingston 6. Copies of these notices, Mr. Alveranga averred, were before the Committee.

The notices addressed to the Reeses were served on one Stacia Stewart at 11Fairway Avenue. It is of significance to note that on the endorsement of service on the notices, the process server stated that these notices were personally served. They were not served, personally or otherwise.

Since the names and address of the owners were known, service of notices should have been either personal, or by leaving them at the owners' address, or sending them by prepaid registered post.

It is obvious that the respondent failed to comply with the requirements and procedure for service of the enforcement notice on the

Reeses in keeping with section 30 (a), (b) and (c) of the Town and Country Planning Act. Section 30 (e) would not be applicable, as, the names and address of the owners were known.

The natural and ordinary meaning of section 23 (1) is that service of an enforcement notice, to be valid, must be effected on both owner and occupier of property. The enforcement notice was not served on the Reeses. It follows therefore, that the non-service of the notice on them renders the service of the notice on the appellant inherently ineffective, null and void.

Having concluded that the failure to serve the owners impugns the efficacy of the service on the appellant, it will be unnecessary for me to consider grounds 1 and 2.

I would allow the appeal, set aside the order of the Minister and quash the enforcement notice.

SMITH, J.A.

ORDER:

The appeal is allowed. The order of the Minister dated March 1, 2004 is set aside and the enforcement notice dated May 20, 2002 is quashed.

Costs are awarded to the appellant to be agreed or taxed.