JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 67 OF 1987

BEFORE: THE HON. JUSTICE KERR, J.A.
THE HON. JUSTICE WHITE, J.A.
THE HON. JUSTICE WRIGHT, J.A.

BETWEEN	KINGSTON & ST. ANDREW CORPORATION	PLAINTIFF/APPELLANT
AND	AUBURN COURT LIMITED	1ST DEFENDANT/RESPONDENT
AND	HARRY PERRIER	2ND DEFENDANT/RESPONDENT

Mr. C.M. Daley and Leon Green for the Appellant

Mr. Gordon Robinson for Respondent

February 8-11 and March 25, 1988

KERR, J.A.:

This is an appeal from the judgment and order of Patterson J. striking out the Plaintiff/Appellant's action with costs to the Respondents. On February 11, we reserved judgment and the interim injunction was extended then and subsequently to March 11, 1988 with the promise of an early judgment.

By Section 5 of the Kingston and Saint Andrew Corporation Act, the Appellant (K.S.A.C.) was declared a municipal corporation of the inhabitants of the parishes of Kingston and Saint Andrew. The Corporation is by virtue of the Kingston and Saint Andrew Building Act, the building authority for this corporate area (save if and when the Minister in the exercise of powers conferred by the Act decrees otherwise) and by Section 2 of the Town and Country Planning Act, the local planning authority for the same area.

On December 1983, the first Respondent sought and was granted permission by the K.S.A.C. to construct an office building on Lot 165 and 166 Trinidad Terrace, New Kingston in the parish of Kingston. The plans, as approved then, limited the building to three floors

above the ground floor. A subsequent application to amend the plan and seeking approval for the addition of other stories was refused. Notwithstanding, the Appellant avers that the Respondents erected a building in contravention of the approved plan and despite notices from the K.S.A.C. to halt, construction continued. On the basis of this alleged flagrant breach and flouting of the Building and Town Planning Acts, the K.S.A.C. by Writ of Summons brought an action against the Respondents for erecting and extending the building otherwise than in conformity with the plans and specifications approved by the Building and Town Planning Committee and seeking an injunction to restrain the Respondents, their Servants or Agents from continuing construction or entering into occupation of the said building.

On March 21, 1985, an exparte interim injunction was granted as prayed was extended and amended at the instance of the Respondents and now in its operative parts reads:

> ".....and upon the Plaintiff undertaking through its Attorneys-at-Law to abide by any order which the Court may make in respect of any damages suffered by the Defendants by reason of this Order, IT IS HEREBY ORDERED that an interim injunction be granted restraining the Defendants -
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> 1. by themselves their servants or agents or otherwise from erecting or extending or procuring the erection or extension of any building or structure at or on lands known as Lot 165 and or Lot 166 Trinidad Terrace otherwise than in accordance with the plans and specifications approved by the Building & Town Planning Committee of the Kingston & St. Andrew Corporation save and except that the Defendants are permitted whether by themselves their servants or agents to enter into and upon the basement parking area and the first three storeys of the said building for which planning approval exists in order to continue construction on the said area and to complete same
>
> 2. by themselves their servants or agents or otherwise from entering into occupation of the said building or from causing or permitting the said building to be occupied whether by their tenants licencees or otherwise howsoever unless and until the said building be made to

" conform with the plans and specifications aforesaid."

The pleadings having been closed both sides made preliminary moves, the K.S.A.C. attacking the genuineness or reality of the defence; the Respondents, the locus standi of the K.S.A.C.

The Respondents' preliminary point which found favour with Patterson, J. and with which this appeal is conceived reads:

"The Plaintiff has no locus standi to apply for the remedies sought as:-

(a) The Plaintiff has no private legal right which it is purporting to protect by the remedies sought; and

(b) The breach alleged on the Defendants' part is a breach of a Public Right and the only person able to enforce such a right is the Attorney General and not the Plaintiff."

The judgment in favour of the Respondents, on appeal was challenged on the following grounds:-

"The learned trial judge erred in law in his finding that the Kingston & St. Andrew Corporation had no locus standi in the suit brought against the Defendants, suing as they did without the Attorney General being a party to the proceedings.

The learned trial judge erred in law in finding that the Attorney General was a necessary party to the proceedings.

The learned trial judge erred in law in holding "that the Kingston & St. Andrew Building Act is supplemental to the Town & Country Planning Act, and together, they protect the public at large against the infringement of public rights."

The learned trial judge in a written judgment reviewed the arguments presented by either side, considered and referred to a number of authorities and the relevant statutory provisions in The K.S.A.C. Act, The K.S.A.C. Building Act, The Town and Country Planning Act and concluded thus:-

"It is plain that the Kingston & St. Andrew Building Act is supplemental to the Town & Country Planning Act, and together, they protect the public at large against the infringement of public rights. They do

> "not confer any private rights on either the Town & Country Planning Authority or the Building Authority. The remedy for a breach of the nature complained of by the plaintiffs in this action is plainly set out in S 10(2) of the Kingston & St. Andrew Building Act, but in my view, that is not the only remedy available where there has been a breach. The court has jurisdiction, in an appropriate case, to grant an injunction at the relation of the Attorney General for the enforcement of a public right or where a public right has been infringed, although that right was conferred by a statute that prescribed remedies for its infringement. (Attorney-General (on the relation of Hornchurch Urban District Council) v. Bastow/1957/ ALL ER 497 followed)."

Then went on:

> "The question arises then, who is it that is entitled in the instant case to invoke the court's equitable jurisdiction? Can the Kingston & St. Andrew Corporation sue in its own name or must it bring a relator action?"

and in pursuit of an answer to this question accepted the statement of the law as set out in Halsbury Laws of England 4th Edition - Volume 37 #230 and 231 and continued:-

> "There are exceptions to the rule to relator actions, as set out at para. 231 of the said volume mentioned above, which reads as follows:-
>
> "The Attorney General is not a necessary party nor is his leave required to bring an action at his relation to enforce the performance of a public duty or to restrain the interference with a public right in the following circumstances:
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> (1) where the interference with the public right is at the same time an interference with some private right or is a breach of some statutory provision for the protection of the plaintiff;
>
> (2) where the special damage suffered by the plaintiff is over and above that suffered by the general public, even though there is no interference with any special private right;
>
> (3) where a local authority considers the bringing of the action to be expedient for the promotion or protection of the interests of the inhabitants of its area."

> "The plaintiffs have submitted that the third exception mentioned above is of general application and that in any event, they fall within that exception in that the relief sought by the plaintiffs is for the protection of the inhabitants of its area, namely, the parishes of Kingston & St. Andrew. I do not agree. This exception came about by special legislation in England, viz, S 222 of the Local Government Act, 1972, and before that, only the first two exceptions were known to the law. There is no legislation in Jamaica comparable to S 222 of the Local Government Act, 1972, and the third exception (supra) is not applicable to Jamaica. The pleadings in this action do not bring it within the first or second exceptions, in my view, and accordingly, I hold that the Attorney General is a necessary party to this action which is seeking to restrain infringements of public rights. The Attorney General may sue ex officio or ex relatione. In that event, the plaintiffs have no locus standi suing as they did, and the action must be struck out."

In support of the grounds of appeal Mr. Daley submitted that while the Attorney-General as parens patriae in general is the only competent authority to bring an action to protect public rights, he is not a necessary party or even the proper party in certain exceptional cases, example, where the action is brought to protect or redress an injury to a right of property. He submitted that in the instant case, the Building Act sets out a regime for the regulation and supervision of building construction in the corporate area - in that regard, he referred to the power to amend or alter the building regulations, the power to impose and collect fees for services rendered in connection with supervision and inspection of building construction (Sections 44,45,54 & 55), to sell property for payment of expenses incurred for demolishing dangerous structures - (Section 52). Such provisions, he argued, invests property rights in the K.S.A.C. He cited in support of this proposition - Attorney-General and Spalding Rural District Council v. Garner 1907 2 K.B. 480.

The facts and decision in Garner's case are concisely summarised in the headnote thus:-

> "By an award made in 1801 under an Inclosure Act the grass and herbage growing in a private road in a parish was to be let yearly by the

> "surveyor of highways or by such other person as the parishioners in vestry assembled should appoint, and the money arising therefrom was to be expended in the repair of the public and private roads in the parish. The defendants caused damage to the letting value of the grass and herbage by wrongfully permitting cattle to graze in the road, and an action was brought against them by the Attorney-General, on the relation of the rural district council, and by the district council for an injunction and damages:-
>
> Held, that the action failed, as regards the district council, because the right of property in the grass and herbage was vested in the parish council and not in the district council; and as regards the Attorney-General, because the right of property which had been injured was one enjoyed by only a limited section of the public, namely, the parishioners, and not by the public at large."

Mr. Daley frankly conceded that the facts in Garner's case are distinguishable. In my view, the matters referred to by Mr. Daley on even the most liberal interpretation could not be said to be rights of property vested in the K.S.A.C. and its city engineer the power and obligation to perform certain duties, and to impose and collect fees for the performance thereof and to recover certain expenses incurred in connection therewith, and Section 83 of the Building Act provides:

> "All fees, costs and expenses, in addition to any other remedy provided, may be sued for and recovered in the Resident Magistrate's Court for Kingston as a debt payable to the person entitled to such fees, costs or expenses respectively."

The present action is not concerned with any of these matters, and the similarity in category with the property rights in Garner's case and which Mr. Daley seeks to invoke is clearly non-existent. Accordingly, Garner's case (supra) so far as it rested on property rights is clearly unhelpful to the Appellant's cause. Counsel, however, as an alternative, sought some support from the following statement of Channell J. at p. 487:

> "In my opinion it follows from these authorities that in the circumstances of this case the parish council might have maintained the action, and that if the parish council had been plaintiffs it would

> "not have been necessary to join the Attorney-General. As to that I have no doubt at all, but it does not decide the whole matter, for there remains the question whether the Attorney-General may not be joined as a party to an action in a case in which it is not absolutely necessary that he should be joined. I find an almost complete absence of authority on that point, but, forming the best judgment that I can, it seems to me that the rights, which the Attorney-General intervenes in order to protect, as representing the Crown, in the capacity, as it is stated in some of the cases, of parens patriae, must be rights of the community in general, and not rights of a limited portion of His Majesty's subjects, especially when the limited portion in question, the inhabitants of a parish, have representatives who can bring the action." (Emphasis supplied)

On the basis of the emphasized part of that statement, Mr. Daley submitted that the K.S.A.C. Building Act has no application outside the borders of Kingston and St. Andrew and therefore as in Garner's case, the rights here are of a "limited" portion of Her Majesty's subjects - namely, those in the corporate area and accordingly the K.S.A.C. is the appropriate plaintiff.

The error in Counsel's argument is not unprecedented; it is to take a statement appropriate to the circumstances of a case and elevate it to a proposition of general applicability. The judge was dealing with "rights of property" specifically vested in the inhabitants of a parish. A right is no less public because it can only be enjoyed by persons who are in or come to a certain locale. In this, I am comforted by the following statement in de Smith's Judicial Review of Administrative Action, 2nd Edition at p. 468:-

> "The nature of the public rights for the protection of which he (The Attorney General) has capacity to sue has never been clearly defined; all that is clear is that for this purpose the concept of public rights is both large and flexible."

That statement was supported by reference to two cases - Attorney General v. Bastow (1957) 1 Q.B. 514 (1957) 1 ALL E.R. 497 and Attorney General v. Smith (1958) 2 Q.B. 173 (1958) 2 ALL E.R. 557

So far, as Garner's case held that the Attorney-General has no locus standi, the more recent opinion is that this statement went too far and that the better view is that the Attorney-General was not

a necessary party in an action of that nature. Wyld v. Silver (1963) 1 CH. 272 approving of an observation to that effect in Weir v. Fermanagh (1913) 1 R. 83.

With respect to the power to alter or amend the regulations under the Building Act, I consider applicable the reasoning in Davenport Corporation and Tozer (1903) 1 CH. 759.

The facts as summarised in the headnote are:-

> "The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, commenced erecting houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as "new streets" which did not comply with the requirements of the borough by-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the by-laws. The by-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the by-laws:-
>
> Held, affirming Joyce J., (1902) 2 CH. 182, (1.) that the facts were not sufficient to justify the inference that the defendants were laying out the highways as "new streets" within the meaning of the by-laws; and (2.) that the action was not maintainable in the absence of the Attorney-General."

In his judgment Collins, M.R., after approving of a statement of Buckley, J., in Attorney General v. Ashborne Recreation Ground (1903) 1 CH. 101 said (page 762):

> ".....that where there is a public wrong, and where the local authority who have certain special rights to sue in their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognised way, namely, at the suit of the Attorney-General. In this case the plaintiffs have attempted to do it without the intervention of the Attorney-General, and, for the reasons given by Buckley J. in the case I have mentioned, I am of opinion that they cannot proceed in the absence of the Attorney-General."

Accordingly, I am of the view that the breaches of the Building Act and/or Town Planning Act as alleged by the Appellant against the Respondents are in relation to public rights and redressable by action brought by the Attorney-General.

This brings me to Mr. Daley's alternative argument namely, that the K.S.A.C. as the authority invested with control over building activity in the corporate area had sufficient interest, obligation and rights to render the corporation concurrently, but independently, competent to bring this type of action in the High Court and to seek injunctive remedy to restrain the Respondents from committing breaches of the Building Act.

In that regard, he identified as interest and obligations, the duties on the K.S.A.C. imposed by the Act and Regulations to ensure that buildings in the corporate area conform with the approved plans and to monitor and supervise construction. He cited in support the reasoning and decision in London County Council v. South Metropolitan Gas Company (1904) 1 CH. 76. He argued that the cases of Bastow and Smith (supra) while illustrative of the Attorney-General's competence to institute relator actions for breaches of the Town Planning Acts, they did not go so far as to positively declare that a Local Authority with powers and duties similar to the K.S.A.C. was not competent to bring an action in the High Court for such breaches. Further, as regards the special legislation, namely, Section 222 of the English Local Government Act (1972), while the provisions of that Act undoubtedly extended the locus standi of local authorities, it could not affect the locus standi of local authorities in the type of cases in which they were held competent prior to the passing of that Act.

Mr. Daley further submitted that assuming that the K.S.A.C. has no property rights to protect, nevertheless, the Corporation has sufficient interest under the Building Act to render it competent to institute these proceedings. He referred in support

of this submission to Medcalf and Another v. R. Strawbridge Ltd (1937) 2 ALL E.R. 393 and Stockwell v. Southgate Corporation (1936) 2 ALL E.R. 1343. The K.S.A.C. Building Act was in force long before the Town and Country Planning Act was enacted, and the learned judge erred in holding that the former was supplemental to the latter.

Mr. Robinson in reply submitted that the facts in L.C.C. v. South Metropolitan Gas Co.are distinguishable from those in the instant case. The K.S.A.C. must have a special interest to bring the action without the aid of the Attorney-General and there is no such interest in the instant case. The decision in L.C.C. v. South Metropolitan was of limited use and not applicable to the instant case. The English cases dealing with similar breaches of planning permission were redressed by relator actions instituted by or with the consent of the Attorney-General (See Stafford Borough Council v. Elkenford Ltd. (1977) 2 ALL E.R.at p. 522(h)). The Act of 1972 conferred on a local authority, the competence to bring an action in the High Court for the promotion or protection of the interest of the inhabitants of its area whenever the authority considers it expedient so to do and in the absence of similar legislation the K.S.A.C. could not bring this action without the aid of the Attorney-General.

Now the K.S.A.C. Building Act contains important and extensive provisions. Part II deals with the Regulation and Supervision of Buildings, and includes, inter alia, provisions for the alteration and additions to existing structures (Section 5); the distance from the centre of the roadway buildings are to be built (Section 7); with provision for notice to comply with this requirement and penalties for disobedience to such notice (Sections 8 & 9); the procedure to be followed in erecting or re-erecting a building including submissions of plans for approval by the Building Authority, and setting out certain essentials that must be met

before approval can be granted (Section 10(1)). Section 10(2) provides:

> "Every person who proposes to erect or re-erect any building or any part thereof, or to extend any building or any part thereof, shall give notice thereof to the Building Authority, and such notice shall be accompanied by -
>
> (a) An accurate ground plan showing the land or site, the frontage line for length of twenty feet, of any building, whether standing or in ruins, adjacent on each side thereof, and the full width of the street or streets immediately in front and at the side or back thereof, if any.
>
> (b) An accurate plan showing the several floors of such building and the front elevation thereof and at least one cross section and such other cross or longitudinal sections and further particulars, as the Building Authority may from time to time by regulation or in any particular case require.
>
> (c) An accurate plan showing the frontage of such building on any street or lane
>
> All such plans shall be to a scale not smaller than one-eighth of an inch to one foot, and the Surveyor shall, if he approve of such drawings, notify his approval of the same in writing to the builder, or he may call for amended drawings for approval or otherwise. In case of dispute the matter shall be submitted to the Building Authority:
>
> Provided always that no plans shall be approved as hereinbefore mentioned unless the class of building and the frontage, elevation and design are in the opinion of the Building Authority suitable to the locality or neighbourhood and unless they make provision for sanitary arrangements to the satisfaction of the Surveyor or the Building Authority or in cases where house sewers cannot be required, to the satisfaction of the Corporation, nor unless plans under the Kingston Improvements Act have been approved by the Building Authority. The Building Authority may also at any time before or after the work has been commenced, require the builder or owner to submit such working drawings or detailed plans as, and drawn to such scale as the Surveyor may prescribe. The procedure in regard to approval or otherwise of such working drawings or detailed plans shall be in all

"respects as above described:

Provided also that the Surveyor may in his discretion accept a notice unaccompanied by plans and approve of the building proposed subject to such written instructions or directions as may from time to time be given by the Surveyor or Building Authority, and in such case any failure to comply with any of such instructions or directions shall for the purposes of the next subsection be deemed to be a deviation from the approved plan.

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; and every builder or other person who shall, in the erection, re-erection or extension of any such building or part thereof deviate from the plan approved by the Building Authority; or, in the case of detailed or working drawings, by the Surveyor or the tribunal of appeal, shall be guilty of an offence against this Act, and liable to a penalty not exceeding two hundred dollars, besides being ordered by the Court to take down the said building or part thereof, or to alter the same in such 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."

The 'tribunal of appeal' means the Chief Technical Director or any person from time to time appointed by him in writing, to hear and determine any appeal."

and Section 24 provides:

"Any person acting contrary to, or failing to comply with any of the provisions of this Act, or the regulations under section 25, shall be guilty of an offence against this Act, and in any case in which no penalty is provided for any person so offending, he shall be liable to a penalty not exceeding ten dollars, and to a daily penalty not exceeding four dollars, for every day during which such offence continues after conviction."

Sections 27-38 deal with the powers and duties of the K.S.A.C.'s "Surveyor" including the serving of notices demanding compliance in cases of irregularity or contravention of the Act or Regulations, and Section 39 provides for non-compliance with such notice and the procedure of summary complaint before a

justice with a view of obtaining an order for compliance, while Section 40 provides that for non-compliance, a builder incurs a penalty not exceeding Forty Dollars ($40.00) per day during the continuance of such non-compliance and empowers the Surveyor inter alia to do all such things as may be necessary for enforcing the requisitions of his notice, and for bringing the building or work in conformity with the Rules of the Act, and that recovery of expenses incurred in so doing from the builder or owner of the premises by Plaint in the Resident Magistrate's Court for Kingston at the instance of the Surveyor. Section 43 empowers the Corporation to settle the form of notices.

Part III of the Act deals with Dangerous Structures and Part IV with Party Structures and the powers of the Corporation in connection with such structures.

In the miscellaneous provisions, there are provisions setting out the powers and jurisdiction of the Resident Magistrate's Court of Kingston, a right of appeal from the decision of such Court and general provisions for the recovery of penalties in a summary manner. The Regulations set out inter alia, minimum standards and requirements as to materials, structure, reinforcements and general structural integrity of different types of construction and a schedule of fees for the rendering of certain services.

The Town and Country Planning Act is primarily concerned with the control of Development (Section 5). Application for planning permission must be made and granted before construction begins as was done in the instant case (Section 6). The construction must therefore, conform with the planning permission as approved, as well as with the requirements of the Building Act and Regulations.

To the K.S.A.C., as Local Planning Authority and Building Authority, is entrusted the power of supervision and the duty to see that the building conforms with the approved plan, as well as, meeting the requirements of the Building Act and Regulations.

It is therefore, more accurate to say that the two Acts are complementary, rather than that the older Act is supplementary to the later. Although our attention was not drawn to English legislation comparable to the K.S.A.C. Building Act, such legislation is dealt with in Halsbury Laws of England, 3rd Edition Volume 31 under the heading Public Health Part 6 - pp. 269-343. In tenor, interest and purpose, the legislation is not dissimilar to our K.S.A.C. Building Act and Regulations - See p. 272 para. 401. Be that as it may, I have not been adverted to any English case in which breaches, such as is alleged in this case - namely non-compliance with a notice of irregularity or contravention of planning permission or approved plans there was action in the High Court by the local authority alone seeking an injunctive remedy. The usual procedure is by invoking the summary jurisdiction as specifically provided by legislation R v. Cherlsey Justices, Ex Parte Franks (1961) 1 ALL E.R. 825, Cater v. Essex County Council (1959) 2 ALL E.R. 213 or by relator action - A.G. v. Bastow (1957) 1 ALL E.R. 497. Having regard to the extensive jurisdiction and powers conferred on the Resident Magistrate's Court, and in particular Section 10, apart from the aura and awe of an order in the Supreme Court, it is difficult to conceive any practical advantages in instituting proceedings in the High Court. No good reason has been advanced for not resorting to the expeditious, inexpensive, and informal procedure by way of complaint in the Resident Magistrate's Court. Why use a hatchet when a pen knife would do?

The cases of Bastow and Smith (supra) and Attorney General v. Chaudry and Another (1971) 3 ALL E.R. 938 affirm the competence of the Attorney-General to bring an action in cases of a breach of similar statutory provisions.

I am reluctant and indeed it is unnecessary for the purposes of this appeal to question the Attorney-General's competence but the Australian case, Ramsay and Another v. Aberfoyle Manufacturing

Company (Australia) Proprietary Limited and Another (1935) 54 C.L.R. 230 provides an interesting variation on the successful prosecution of relator actions.

The facts are set out in the headnote:-

> ".....the defendants were proceeding to erect a factory within an area in which the erection of a factory was prohibited by a municipal by-law. The by-law imposed penalties for its infringement and also provided that, where a building was erected contrary to the by-law, the council of the municipality might have the building pulled down. R. owned land adjacent to the factory site. In an action in the Supreme Court of Victoria by R., and by the Attorney-General of Victoria at the relation of R., the plaintiffs applied for an interlocutory injunction restraining the defendants from proceeding with the erection of the factory. The application was refused. On appeal to the High Court of Australia, it was held by Latham C.J., Rich and McTiernan JJ. (Starke J. dissenting), that the injunction was rightly refused."

In the course of his judgment, Latham C.J. said:-

(pp. 240-241) -

> "The by-law in question, made in precise and detailed conformity with the statute, provides for three kinds of penalties in order to secure its enforcement. There is, first, a penalty of not less than one pound and not exceeding twenty pounds. Then, secondly, if the council thinks it proper to give a written notice of the offence, there is a penalty not exceeding two poinds a day for a continuing offence. Thirdly, if the council, after hearing the owner or builder, is of opinion that the building should be pulled down or removed, the council may, by its officers and workmen, pull it down or remove it. It would be difficult for a Legislature more clearly to show its intention to provide a complete code of remedies. Everything that a Court of equity can achieve can in substance be attained by the application of the by-law. The Legislature, in explicitly authorizing such a by-law, has indicated in the clearest manner that it is for the council in its discretion to decide, by a simple and inexpensive procedure, whether a building which (ex hypothesi) is being erected in contravention of the by-law, should be pulled down or removed. In my opinion, apart from other considerations, the application of the remedy by way of injunction is in this case definitely excluded by the statute which expresses so clear an intention as to the means whereby this particular by-law shall be enforced. The relevant discretion is expressly committed

> "to the council. The council is a representative body, responsible to the ratepayers, who can express their approval or disapproval of the manner in which it exercises its powers and discharges its duties.
>
> It may be observed that this by-law does not present a case of the statutory 're-enactment' of a previously existing common law liability as in Stevens v. Chown (1901) 1 CH. 894, at p. 903, and that in cases like Attorney-General v. Ashborne Recreation Ground Co, (1903) 1 CH. 101 and Attorney-General v. Wimbledon House Estate Co. Ltd. (1904) 2 CH. 34 there was no actually available provision in the law under which the local authority (which actually sought the aid of the Court) could itself so act as to secure observance of the law by pulling down the unlawful structure."

In the Stafford Borough Council case (supra) the approach was somewhat different. In contravention of the Shops Act 1950, the company held a market each Sunday on land which it owned. The use of the land for a Sunday market also contravened The Town and Country Planning Act, 1971 since planning permission had been refused by the local authority. The local authority in the exercise of its duty under Section 71(1) of the 1950 Act to enforce the provisions of the Act, successfully prosecuted the Company in the Magistrate's Court for contravention of the Act. The Company appealed against the convictions and while the appeal was pending, continued to hold the market each Sunday. The local authority applied for and was granted by the Chancery Division of the High Court an injunction restraining the Company. The Company appealed, contending that in the exercise of its discretion, the Court should not have granted the injunction, because the remedies provided by the Act had not been exhausted and pursued to finality.

On this question, Lord Denning, M.R. after referring to the facts and the sanctions for such breaches of the Shop Act, 1950, said at p. 528:

> "In those circumstances, the case comes within the principle which I endeavoured to state myself in Attorney-General v. Chaudry 1 (1971) 3 ALL ER 938 at 947, (1971) 1 WLR 1614 at 1624:

" 'Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless the High Court always has reserve power to enforce the law so enacted by way of an injunction or declaration or other suitable remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do.'

That principle applies here."

In the Attorney-General v. Smith and Others (1958) 2 ALL E.R. 557, an action was brought by the Attorney-General at the relation of the Egham Urban District Council to whom the local planning authority, the Surrey County Council, had delegated the functions of the local planning authority under The Town and Country Planning Act, 1947, S. 34 as regards the Urban District of Egham, for an injunction restraining the defendants, their servants, or agents from using or causing or permitting to be used as a caravan site any land within the boundaries of the Urban District Council of Egham, without the prior granting of permission under The Town and Country Planning Act, 1947. Planning permission had been sought and refused and enforcement notices which had been served on the defendants, had been upheld on appeal by the Minister. On appeal, it was held following inter alia the earlier case of the A.G. v. Bastow that the Court had jurisdiction to grant an injunction when the Attorney-General was suing for the purpose of enforcing a public right although that right was conferred by a statute that presented penalties for acts done in breach of it.

As indicated earlier, our immediate concern in the instant case is not whether or not the Attorney-General would have had a locus standi but whether or not in addition to the remedies provided by the Building Act, the K.S.A.C. had a locus standi to institute proceedings for the cause of action.

In the Stafford Borough Council (supra), Oliver J. when considering the question of injunctive remedy said (p.522):

> "In general, and it is clear that there are exceptions, an applicant for an injunction to restrain the commission of a purely statutory offence must show that he has exhausted the statutory remedies, if not at the time when he starts the proceedings, at least at the time when the matter comes before the court. Thus one finds that in Attorney-General v. Bastow (another caravan case) Devlin J entertained some doubt whether three successive convictions for contravention of enforcement notices constituted a sufficient exhaustion of the statutory remedies, although he went on to say that it was a matter of administrative discretion whether, in the case of a person who had shown himself determined to defy the law, the enforcement of the law was best achieved by going to the magistrates' court in a series of applications or by going to the High Court and asking it to use its powers. In saying this, however, he was, I think, clearly influenced by the fact that the action then was, as it then had to be, a relator action which could only be brought after the circumstances had been reviewed by the Attorney-General. Under the 1971 Act, of course, that is no longer the case."

Implicit in that part of the statement emphasized, is a recognition that prior to the Act of 1971, local authorities were not competent to bring such proceedings without the aid of the Attorney-General.

In the A.G. v. Chaudry (supra) - although the Greater London Council also was, "suing in their own right" and although the defendants were in flagrant breach of the London Building Acts - (Amendment) Act 1939, the Attorney-General was a Plaintiff in relator action and accordingly, the question of the L.C.C.'s competence to be plaintiff independently of the Attorney-General was not raised. The decision as stated in the headnote re-affirmed the proposition that "notwithstanding that an Act provided a remedy in an inferior Court for breach of its provisions, the High Court had power to enforce obedience to the Law as enacted by way of injunction wherever it was just and convenient to do so."

There, therefore, remains for consideration, whether the proposition extracted from the case of London County Council v. South Metropolitan Gas Company (supra) is wide enough to be

applicable to the instant case. The relevant facts are important.

They are summarised in the headnote thus:-

> "By the South Metropolitan Gas Company's special Acts of 1869 and 1876 provision was made for the public testing of the quality of the gas supplied by them to their customers. The mode of testing and the situation and number of the testing places, which were to be provided by the company and to be under the control of the Metropolitan Board of Works (whose powers subsequently became vested in the plaintiffs, the London County Council), were to be prescribed by gas referees appointed by the Board of Trade, and "daily" testings were to be made by gas examiners appointed by the Metropolitan Board.
>
> Similar provisions were contained in the special Acts of the other metropolitan gas companies. By an Act passed in 1880, which was applicable to all the metropolitan gas companies, the provisions as to "daily" testings were substantially re-enacted by a section which provided that a gas examiner should, at each testing place, "make daily" such number of tests as the gas referees should prescribe. Other sections gave the Metropolitan Board, as "the controlling authority," the control and management of the testing places."

In his judgment Romer L.J. dealt with the question of locus standi thus (p. 84-85):-

> "With regard to the point as to whether the county council are entitled to sue, I clearly think they are. It was suggested that they had no sufficient interest in the subject-matter of this action to justify them in being the plaintiffs in the action. But the county council is the controlling authority under the Acts, and, in particular, it has had committed to it the control and management of the testing stations. Why has it had committed to it the control and management of the testing stations? Clearly to enable it to carry out the duties and obligations cast upon it as the controlling authority.
>
> Now the county council are of opinion that, gas being delivered on a Sunday, it ought to be tested on a Sunday according to the wording of the Act, but they find that the gas examiners, the testing operators, are not allowed by the defendant company to enter the testing stations, although they are under the control and authority of the county council.

"The county council say that, but for the interference of the defendants, the testing would go on daily, because the testers are quite willing and ready, and in pursuance of their duty, to go to the testing stations daily, but that they, the county council, are prevented, as the controllers of the testing stations, from allowing the testers to go there because the defendant company choose to say that no tests shall be made on the Sunday, and that no one but themselves shall have any access to the testing stations on Sundays. It appears to me that the county council have sufficient interest, obligations, and rights to justify them in coming to this Court and seeking for an injunction to restrain the defendants from practically excluding the county council and their testers from the testing stations; and that, in substance, is what this action is for, the real question behind it being that which we have decided, namely, as to whether, under the Acts of Parliament, the testing ought to go on at all on a Sunday."

While Stirling L.J. had this to say (p.85-86):-

"With regard to the question as to whether the London County Council are the proper plaintiffs in the present action, if it were necessary to decide it, I should be of opinion that the London County Council were the proper plaintiffs. To them, by the Act of 1876, are entrusted the control and management of the testing places, materials, and apparatus provided by the company, and it seems to me that, so far from the company being entitled to control these places, the view taken by the Acts, particularly the Act of 1880, is that everything which is necessary to be done for carrying into effect the directions of the Act with respect to testing shall be dealt with by the controlling authority, namely, the London County Council, and not by the company. That to my mind is shewn very strongly by s. 10 of the Act of 1880, which, whilst it gives the company the power, if they think fit, to be represented by an officer at each testing, provides this - that "The controlling authority shall state at what times it is proposed to make such testings on any particular day upon receiving a request in writing from the company in the forenoon of the previous day." That seems to me to shew that it is for the company to apply to the controlling authority, the London County Council, for the purpose of exercising the power conferred by this portion of the Act, and that they, the company, have not the power of excluding the controlling authority, and the persons authorized by them, from the testing stations which have been established under the Act.

> "It seems to me that in this case there was a clear interference by the defendants with the control and management which are by statute vested in the London County Council. I think, therefore, that the appeal fails and ought to be dismissed with costs."

Professor de Smith in his Judicial Review of Administrative Action (Second Edition) gave this exception dubious recognition thus (p.475):-

> "Probably a body invested with exclusive control over a field of activity that is of public concern may sue without the Attorney-General to obtain an injunction to restrain incursions upon its province. This proposition may perhaps be inferred from a decision in which the London County Council, to which full control over gas testing in its area had been committed by statute, was held to have a sufficient interest to sue in its own name for an injunction to restrain a gas company from interfering with the right of its examiners to make certain tests."

and in addition to L.C.C. v. South Metropolitan Gas Co., the relevant footnote referred to the Australian case, Oxley County D.C. v. Macleay River County D.C. and Mineral Deposit Ltd. (1965) S.R. (N.S.W.) at p. 29.

I have not had the benefit of reading this New South Wales case but on the face of it, the statement of the judges in the South Metropolitan Gas Company case is open to an interpretation which gives a wider proposition than the circumstances of the case seem to demand, in view of the general rule that where a public right was involved, the Attorney-General is the proper authority to institute proceedings in the High Court by relator proceedings. I am unwilling to give a liberal interpretation to "control and management" and would limit the application of the reasoning and decision in the South Metropolitan Gas Co. case to analogous circumstances where there is direct interference in and obstruction to, the performance of the duty imposed on the local authority. I would not regard the role of supervising and monitoring of an activity to see that breaches of the law are not committed by persons engaged in that activity, exclusive control and management

of the activity in question. On the other hand, when there is direct interference with the role of the authority or a special interest has been affected, then the proposition in the South Metropolitan Gas Co. might well be applicable. The Plaintiff's Statement of Claim clearly aver that the defendants were in breaches of The Town and Country Planning Act and/or K.S.A.C. Building Act in constructing a building contrary to the approved plan and continuing to do so despite a "cease work notice". I can find therein no allegation of direct interference or obstruction to the K.S.A.C. in the performance of their duties under the Act.

The case - Stockwell v. Southgate (Corporation) supra is unhelpful to the Plaintiff's cause. The points decided in that case are not applicable to the instant case. The declaration sought was refused on the basis that the proper proceedings to test the question whether or not the highway was repairable by the inhabitants at large were proceedings in a court of summary jurisdiction under the Private Street Works Act, 1892.

In Medcalf and Another v. R. Strawbridge, Ltd.(1937) 2 ALL E.R. 393 , the facts are set out in the headnote at p.393:-

> "The owner of a vehicle attached to his vehicle a skid-pan which did damage to the surface of an unadopted road. In an action by two of the frontagers to restrain the continued use of the skid-pan, the owner of the vehicle contended that if what was being done amounted to a nuisance, it was a public nuisance and, the damages being common to all the subjects of the Crown, the Attorney-General alone could sue. The plaintiffs claimed to have a separate interest on the grounds (i) that they were under a contractual obligation to repair, (ii) that they had an interest in maintaining the road which might be taken over by the local authority under the Private Street Works Act, 1892, s. 6, and repaired or re-made at the frontagers' expense, and (iii) that the value of the plaintiffs' premises might be, and would be, affected by the condition of the road."

Atkinson J. in his judgment identified the contentions thus (p.396):-

> "The main defence is, I gather, that no injunction will lie at the suit of these plaintiffs. It is said that, if what is being done does amount to a nuisance, it is a public nuisance, and, the damage being common to all the subjects of the Crown, the Attorney-General alone can sue."

and the Plaintiff's answer thus (p.396):-

> "They claim to have a separate interest on three grounds. First, they said, they were under a contractual obligation to repair. Secondly, the plaintiffs said that under the Private Street Works Act, 1892, s. 6, if the local authority decided to make the road and take it over it will be done at the expense of the adjoining owners, and that the existing condition of a road is a material matter for the authority to consider before exercising its powers, and, therefore, that they the plaintiffs, have a special interest in maintaining the road in a satisfactory condition, and so postponing the making and taking over. The relevant wording of the section is:
>
> > "Where any street...is not sewered, levelled, paved, ...made good ... to the satisfaction of the urban authority may ... resolve ... to do ... the following works ...
>
> so that it is clear that the existing condition of a road is a matter which is material for the council to consider, and, if it gets into a state of dis-repair, it may lead to the council making the road in an expensive way as far as the frontagers are concerned, and making it at their expense. The third ground on which a special interest was claimed was that the value of these premises might be, and would be, affected by the condition of the road."

The first ground be held applicable to Medcalf, the original transferee and,

> " As to the second ground, in my judgment, the possible liability under Sect. 6 does place the two plaintiffs in a position differing from that of the general public, and does enable them to say successfully that they were in November threatened with a particular injury. .....
>
> "As to the third ground, again I agree with Mr. Fortune that the owners of houses or premises on a private road have a special interest in preventing damage to the road because of the possible effect on the enjoyment and value of the houses."

In the instant case, the K.S.A.C. can claim no special interest or right analagous to those identified in Medcalf's case. In the circumstances, notwithstanding the serious nature of the allegations against the defendants, I am constrained to hold that the means of redress in the instant case are either by summary proceedings in the Kingston Resident Magistrate's Court (See R. v. L.A. Hamilton 4 JLR 29); or by a relator action by the Attorney-General.

The other ground argued reads:-

> "The learned trial judge erred in law and/or wrongly exercised his power to strike out the action instituted by the Plaintiff as such a decision was not the most efficacious or just decision having regard to all the circumstances."

Appellant's Counsel submitted that the judge in the Court below should have adapted the approach of Plowman J. in Hampshire C.C. v. Shonleigh Nominees Ltd. (1970) 2 ALL E.R. 154. in that case the order was:-

> "In my judgment therefore counsel for the defendants' argument on this point succeeds and unless the Attorney-General is prepared to give his fiat, the originating summons must be struck out."
>
> The report continues:-
>
> "On the plaintiff's undertaking to apply with all due speed to the Attorney-General for his fiat, no order to be drawn up pending the result of that application; if the Attorney-General gave his fiat the plaintiff to be at liberty to amend by joining him as a co-plaintiff; if the fiat was refused, the originating summons to be struck out."

This submission was not referred to in the written judgment of Patterson J. According to appellants' counsel, the application for an adjournment to join the Attorney-General occurred in this way:-

> "The learned trial judge delivered a written judgment. At the end of the reading of the judgment, Attorneys at Law for the plaintiff sought the leave of the court to stay the operation of the order to give counsel an opportunity for consultation with their client

> "having regard to the effect of the order. The court expressed the view that there was nothing to stay and refused the application."

Patterson J. was not adverted to the action taken in the Hampshire C.C. case. The application, informal as it was, and coming after he had delivered himself, was clearly not entertained by him.

The advantages of such a course has not been urged on appeal and I am unwilling to entertain such an application at this stage.

For the reasons set out herein, I would dismiss the appeal with costs to the Respondents.

WHITE, J.A.

I have had the opportunity to read the draft judgment of Kerr, J.A. I agree that the appeal be dismissed for the reasons so lucidly expressed by him.

WRIGHT, J.A.

There is no doubt that the appellants are guilty of flouting the law in a most reprehensible manner. Nevertheless for the reasons so duly set out by Kerr, J.A., I am constrained to agree that the appeal must be dismissed with the consequential order for costs.