IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. HCV 02584 / 2006

BETWEEN	KINGSTON AND SAINT ANDREW CORPORATION	CLAIMANT
A N D	DIANA COOKE AND DEBORAH EZZO	1ST DEFENDANT
A N D	COLIN COOKE	2NDEFENDANT
A N D	C. C. L. LIMITED	3RD DEFENDANT

Miss Rose Bennett, Mrs. Cryslin Beecher-Bravo and Miss Marsha White instructed by Bennett Beecher–Bravo for Claimant.

Mr. Christopher Dunkley instructed by Cowan Dunkley Cowan for 1st Defendant.

Mr. Christopher Dunkley and Mr. Peter Asher instructed by Mr. Ian Phillipson of Ian Phillipson & Co. for 2nd and 3rd Defendants.

Application for injunction against development-removal of dividing fence-unauthorized change of user- replacement entrance gate above four feet in height

Heard: 5th and 10th October, 27th December 2006 and 31st January 2007

BROOKS, J.

Mrs. Diana Cooke and Mrs. Deborah Ezzo are the owners of real property situated at No. 37 Bedford Park Avenue, Kingston 10 in the parish of Saint Andrew. When they bought the property it was being used as a residence, but they didn't wish to use it for that purpose. They had the dwelling house on the property converted for use as commercial premises and at the time of this hearing it was being so used. Mrs. Cooke and Mrs. Ezzo also went further. They redesigned the entrance to their property, removing the existing gate and replacing it with a wider, higher gate. They also entered into an arrangement with C.C.L. Limited which owns an adjoining property, No. 48 Constant Spring Road. That arrangement resulted in the removal of the dividing fence

between the two properties and the creation of a situation where Bedford Park Avenue was no longer a *cul de sac* with no access further than the gate of No. 37. Motor vehicles and pedestrians can now travel between Bedford Park Avenue and the nearby Constant Spring Road via these properties, whereas this was not previously possible. Mr. Colin Cooke had supervision of the execution of some of the work carried out by these landowners.

The Kingston and Saint Andrew Corporation (KSAC), which has statutory responsibility for supervising planning, building and development in the parishes of Kingston and Saint Andrew has objected to these changes by these landowners. The KSAC asserts that these changes required its approval and that that approval was neither sought nor granted. Upon receiving complaints from neighbours living at Bedford Park Avenue, it wrote a letter to Mrs. Cooke et. al. demanding that the situation be reversed. The demand was not complied with. The KSAC has therefore applied to this court for an injunction ordering the landowners to reinstate the property to its former condition.

Mr. Dunkley, appearing for the landowners, has asked the court to refuse the KSAC's application. He has argued that the tenor of Bedford Park Avenue has changed from being purely residential and that there has been mixed use for many years. In terms of the complained throughway, Mr. Dunkley has submitted that the removal of the dividing fence is in no way unlawful and that the manning of the gates to both premises prevents it being a public throughway. Based on this, he says, there is no need for an injunction.

The questions to be addressed are therefore as follows:

1. Do the landowners' actions constitute 'development' within the ambit of The Town and Country Planning Act (the Planning Act)?
2. In light of the breaches of the Planning Act and the Development Order made thereunder, should the landowners be restrained?
3. In light of the breach of restrictive covenant and zoning restrictions, should the unapproved use of No. 37 Bedford Park Avenue be restrained?

Before dealing with these questions, I shall first address two procedural issues raised by the landowners.

Procedural Issues

The failure to serve an enforcement order:

Mr. Dunkley submitted that the claim brought by the KSAC was misconceived because it had been commenced without the KSAC having first served an enforcement notice on the landowners. In his oral submissions Mr. Dunkley conceded that Section 23B (b) of the Planning Act did allow the KSAC to apply to the court for an injunction to stop or prevent unauthorized development, without having first served an enforcement notice. He however argued that such a 'direct' application was a "fast track" procedure, and that the KSAC had to "justify not proceeding by stop notice or enforcement notice". He submitted that "[e]ither they go through all the hoops or they justify. Otherwise there would be no necessity to go through all those steps". He concluded that not only did the KSAC not attempt to justify this direct procedure but that there was nothing in the factual situation which warranted an omission of the stop notice/enforcement notice procedure.

There is nothing in the statute which supports Mr. Dunkley's submissions. Section 23B does not place any restriction on the responsible authority (in this case the KSAC), when bringing the matter before the court. The relevant part states as follows:

> "23B. – (1) Where-
>
> (a) a person on whom an enforcement notice is served under section 23 fails to comply with the provisions of that notice within the period specified therein; or
> (b) a local planning authority, the Government Town Planner or the Authority, as the case may be, **considers it necessary or expedient for any perceived breach** of planning control to be restrained,
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> the local planning authority, the Government Town Planner or the Authority, as the case may be, may apply to the court for an injunction, **whether or not they have exercised or are proposing to exercise any of their other powers under this Act**." (Emphasis supplied)

The use of the terms emphasised, in my judgment, gives an unfettered discretion to the KSAC, as to the method it uses for resorting to the jurisdiction of the court. The subsection, in fact, makes it clear that the relevant authority need not have resorted to its other powers before seeking the court's order. I would also rely on the dictum of Patterson J.A. in *Infochannel Limited v Telecommunications of Jamaica Limited* (1995) 32 J.L.R. 253 at p. 275F where he said:

> "The right of a person to invoke the jurisdiction of the court cannot be taken away except by an enactment in clear and unequivocal terms, and the fact that an enactment creates a tort and gives damages as a remedy, does not necessarily preclude any or all other reliefs."

The effect of an application by the landowners for approval of the development:

At the end of the submissions on behalf of the KSAC, the landowners, at the suggestion of the court, applied for an adjournment in order to file an application for the KSAC to approve the changes which they had made. The adjournment was granted, and the application was duly made. When the claim came on again for hearing some six

weeks later, there had been no decision made by the KSAC on the landowners' application. Miss Bennett, appearing for the KSAC, informed the court that the KSAC was awaiting a decision from an external authority, without which it could not give its decision.

Mr. Dunkley then made this remarkable submission; he said that the lodging of the application by the landowners has changed the status of these proceedings. In his submission, "as long as there is an application this court cannot proceed". In his written submissions, at paragraph 43, he opined that "by virtue of the [landowners'] application...this matter ought no longer to be live before this Honourable Court and as such...the matter would effectively come to an end." He submitted that the application process should replace this claim and in the event that there was an eventual refusal, the KSAC would be obliged to institute fresh proceedings against the landowners.

I rejected that submission at the time that Mr. Dunkley made it. The submission is, in effect, that the landowners could deprive this court of jurisdiction by simply lodging an application with the KSAC, regardless of the merits of that application. In my view the proposition is untenable.

I shall now turn to the substantive issues to be decided.

Do the landowners' actions constitute 'development' within the ambit of the Planning Act?

There are several steps taken by the landowners, about which the KSAC complains. They are as follows:

a. The change of use of the premises and its curtilage;

b. The removal of the dividing fence between No. 37 Bedford Park Avenue and No. 48 Constant Spring Road;

c. The creation of an access way linking Bedford Park Avenue and Constant Spring Road;

d. The demolition and reconstruction of the gateway/entrance to No. 37 Bedford Park Avenue.

There was also a complaint that the yard space of No. 37 had been paved and parking bays had been created thereon. The complaint, however, was proved to be without basis as a visit to the *locus in quo* by the court, revealed that no such thing had been done. Similarly a complaint, that the KSAC's sidewalk in front of No. 37 had been demolished and reconstructed, was without factual basis.

An analysis of this issue must necessarily commence with a definition of the term 'development'. Section 5(2) of the Planning Act defines the term thus:

> "In this Act, unless the context otherwise requires, the expression "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land:
>
> Provided that the following operations or uses of land shall not be deemed for the purposes of this Act to involve the development of the land, that is to say-
>
> (a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building;..."

There are other exceptions listed but these are not relevant for the present purposes.

The change of use of the premises and its curtilage:

Miss Bennett, cited authorities in support of her submission that the admitted conversion of the dwelling house situated on No. 37 Bedford Park Avenue, to the use of a commercial entity was a material change of use of the building. I unhesitatingly agree and regard the situation as being without the need of case law as authority for that

conclusion. Indeed the landowners have not sought to argue otherwise. Since the use of the sole building on the land has been changed, I believe it to be obvious that the use of the land forming its curtilage has also been changed. It cannot, with any credibility, be said to still be the curtilage of a residence. If authority is required for this position, I find that the case of *James v Secretary of State for the Environment* (1990) 61 P & CR 234, cited by Miss Bennett, supplies that authority. I shall later address these changes in the context of the restrictive covenants endorsed on the Certificate of Title for No. 37.

The removal of the dividing fence between No. 37 Bedford Park Avenue and No. 48 Constant Spring Road:

The KSAC's complaint about the removal of the dividing fence has two aspects to it. The first aspect is that it bolsters the complaint that the use of the premises has been changed. That aspect has already been addressed. The second aspect is that the removal, in itself constitutes an "operational development", contrary to the Planning Act. Miss Bennett submitted, at page 18 of her submissions that "the demolition and/or removal of the boundary walls along lots 37 (sic) and 48...constituted a development as it was an operation which resulted in a physical alteration to the land which has a degree of permanence". Counsel went as far as saying that the removal of the fence, "materially affected the external appearance of the dwelling house", on No. 37. She cited, in support, the case of *Coleshill & District Investment Co. Ltd. v Minister of Housing and Local Government and anor.* [1969] 1 W.L.R. 746.

In *Coleshill*, the House of Lords decided that the relevant Minister was not in error when he ruled that blast walls and embankments constructed around, and for use with, buildings in an ammunition depot, were integral parts of the buildings. The Minister further ruled that the removal process (utilizing mechanical excavators, and

trucking away the waste) constituted an "engineering operation", and that the removal would involve structural alterations to the buildings affecting their external appearance. The House of Lords found that the Minister was not in error when he ruled that the operations constituted 'development' and required planning permission.

The circumstances of that case are quite different from the instant one. Even then, that case was considered a borderline one by Lord Upjohn (p. 760 F). Critical to the decision there, was the fact that the blast walls and embankments were constructed as integral parts of the buildings they surrounded. They concealed much of the buildings; the walls were nine feet high while the buildings' walls were eleven and the roofs at their highest point were thirteen feet. The embankments concealed all of the blast walls, and were described by Lord Morris of Borth-Y-Gest as "camouflage" for the walls and much of the buildings (p. 752H). One of the questions which were raised in *Coleshill*, was whether demolition could be considered development. Their Lordships would only say that demolition was not excluded from the definition of the term. They ruled that the question did not fall for determination in that case.

In the instant case the landowners removed a chain-link fence, with a concrete base, from between their respective properties. No evidence has been given concerning the method used to demolish the dividing fence, but in an affidavit filed on September 5, 2006, Mrs. Joan Williams, a resident of the Bedford Park Avenue community, deposed that she saw trucks removing debris (presumably from No. 37).

Their Lordships in *Coleshill,* were of the view that, in determining whether some act constituted 'development', the thing done, the process used to achieve it, and the result should be outlined. Based on the outline the question, whether or not it constitutes

development, could then be answered. I find that the removal of the fence, by itself does not constitute 'development' within the contemplation of the Act. I cannot accept that the mere removal of a dividing fence between neighbours could fall within the definition of 'development'. There is nothing inherently illegal about it. It does not, by itself, cause offence to the neighbours. When however, the removal is combined with the change of use of No. 37, I find that the picture does in fact change; the physical character of the land is altered. Such a change, I find does require approval from the planning authority.

The creation of an access way linking Bedford Park Avenue and Constant Spring Road:

As in the case of the removal of the dividing fence, I find that the creation of an access way, to No. 48 Constant Spring Road from Bedford Park Avenue, constitutes a change in the character of No. 37 Bedford Park Avenue. The KSAC claims that the action by the landowners created a through-way to Constant Spring Road. I, however, do not accept the assertion as being correct.

The previously mentioned visit to the *locus in quo* revealed that the entrances/exits between the respective roads and the premises were equipped with gates. The visit commenced fairly early in the morning and at the commencement, the gate at No. 37 was unmanned. By the end of the visit, both gates were manned. As presently configured these properties could not be properly considered a public through-way from one road to the other, used to the detriment of the residents of Bedford Park Avenue.

The demolition and reconstruction of the gateway/entrance to No. 37 Bedford Park Avenue:

The KSAC has complained that the landowners have raised the height of the boundary wall facing Bedford Park Avenue and they have replaced the entrance gate with a taller gate. The only argument of merit submitted by Miss Bennett in respect of this

issue was based on a fifty year old order made under the Planning Act (which was then called The Town and Country Planning Law). By Schedule 4 of that order, certain minor operations were deemed permitted. Among the permitted operations were:

1. "The erection or construction of gates, fences, walls or other means of enclosure not exceeding 4 feet in height where abutting on a highway used by vehicular traffic or 7 feet in height in any other case, and the maintenance, improvement or other alteration of any gates, fences, walls or other means of enclosure."

The permission is subject to the condition that, "no improvement or alteration shall increase the height above the height appropriate for a new means of enclosure".

The landowners have not contested the fact that the newly constructed boundary fence and gate, abutting Bedford Park Avenue, are in excess of four feet. They contend that, as landowners, they are entitled to certain privileges of ownership, including alteration of structures on their property. They are obliged however to comply with the statutes, including the Planning Act which restrict that right. The fact that gates and fences abutting highways above 4 feet in height are not uncommon in Saint Andrew, does not allow a disregard of the Order. The activity clearly required planning approval.

In light of the breaches of the Planning Act and the Development Order made thereunder, should the landowners be restrained?

Section 23B (2) of the Planning Act stipulates that the court may, "[o]n an application under subsection (1)...grant such injunction as the court thinks appropriate for the purpose of restraining the breach". There is no further provision concerning the exercise of the court's discretion in granting or refusing the injunction. The learned authors of *Blundell and Dobry's Town and Country Planning,* at paragraph 886, explain the purposes of the UK equivalent of the Planning Act.

> "[It] is an Act which is designed to confer a benefit on the public: it is for the orderly development of the countryside, to prevent unsightly development, to prevent the development of too crowded areas, to prevent the development of industrial buildings and plant in what should be a residential district, and for the mapping out of residential districts and industrial districts and so forth. It is obviously an Act which is designed for the public good and can be used for great public advantage. Therefore if a defendant shows by his conduct that he intends to avoid the Act and act in breach of it so far as he can and for so long as he can, then the Attorney-General is entitled to an injunction."

The KSAC's amended fixed date claim form requests the following orders:

> "1a. That an injunction against the Defendants their agents and/or their servants are (sic) to restore 37 Bedford Park Avenue...to its original condition prior to the development operations on in over and under the said land and the material change of the use of the said land on in over and under the said land.
>
> b. That the Claimant's roadway at Bedford Park Avenue...be properly restored and/or reconstructed by the Defendants their agents and/or servants to the satisfaction of the Claimant."

The application at b. has been proved to lack a factual basis, as no change to the roadway has been proved. Though some attempt was made by the neighbour Mrs. Williams, to describe the pre-development state of No. 37, it was restricted to the grounds and the exterior colour of the building. There is therefore no other evidence as to the pre-development state of the building, save for the fact that the landowners have revealed that the front windows have been changed, and that a wrought iron grille at the front of the building has been removed. The other major complaint by the KSAC is of course the removal of the dividing fence which facilitates the commercial activity on these premises.

I shall approach the application along the lines set out in Chapter two of *Injunctions* (8th Ed.) by David Bean Q.C. This chapter deals with permanent injunctions and I shall take the liberty of adjusting the guide-lines to accord with this situation.

Is there a serious issue to be addressed by the injunction?

I think it fair to say, based on the preceding discussion, that the issues involved in the use of No. 37 are in fact serious issues to be resolved. If an injunction is in fact granted, I believe that it would be possible to measure its effectiveness and the extent of the landowners' compliance with the order of the court.

Are damages an adequate remedy?

The answer to this is fairly straightforward. The public's interest is to be protected and damages would not be an adequate remedy for these breaches.

Where does the balance of convenience lie?

It is true to say that the KSAC would not incur any expense, in the event that this application was refused. The landowners would however incur expense and loss in implementing the changes requested. They have however carried out the development operations, in violation of the Planning Act and its order thereunder. They can't be heard to say it is too expensive to correct the breaches.

Is the KSAC guilty of laches or acquiescence?

The behaviour of the KSAC cannot be faulted. The landowners have made no complaint about it, and the evidence shows that the KSAC acted fairly promptly upon being informed of the situation, by the residents of Bedford Park Avenue.

The issue of the dividing fence:

I am of the view that when all these factors are taken into account, there is no reason to deny the grant of an injunction in the matter of the fence. It facilitates the commercial use of No. 37 in breach of the zoning requirements and the Planning Act.

The issue of the modification of the building, front fence and gate:

I am less confident about the matter of the building, the front fence and gate. These do not necessarily facilitate the unlawful use of No. 37. Nothing would be gained by either the KSAC or the neighbours in having the gate and front fence lowered. Gates and walls of this height are a common occurrence in Saint Andrew. In light of that it would seem that this would be the sort of development which the KSAC would approve.

I have not been provided with any evidence that the current state of the building prevents the use of the premises as a residence. Section 5(2) (a) of the Planning Act excludes, from the definition of 'development', alterations to the interior of the building. For those reasons, and because the former state of the building has not been described, I am not prepared to order the reversion of the building to its former state.

In light of the breach of restrictive covenant and zoning restrictions, should the unapproved use of No. 37 Bedford Park Avenue be restrained?

The landowners have sought to argue that they should not be restrained in the change of use of No. 37, because there are other properties along Bedford Park Avenue which are used for commercial purposes. This use, they say, is with the knowledge and acquiescence of the residents of Bedford Park Avenue. In my judgment, those arguments properly belong in the context of applications to remove or modify restrictive covenants, where issues of compensation may be addressed. I am of the view that the use of No. 37 as commercial premises, in breach of the restrictive covenant, ought to be restrained.

Conclusion

The breaches of the Planning Act and the orders thereunder, as well as the breaches of the restrictive covenant concerning the use of premises No. 37 Bedford Park Avenue require the grant of an injunction to prevent their continuation. One effective way

of encouraging compliance with the zoning requirements, is to have the fence restored to prevent the access to the busy Constant Spring Road.

I do not think it necessary to restore the building or the gateway to their pre-development status, as that will not secure any advantage for the residents of Bedford Park Avenue or indeed the KSAC.

After considering all these factors it is declared that:

Diana Cooke and Deborah Ezzo, the registered proprietors of all that premises known as No. 37 Bedford Park Avenue in the parish of Saint Andrew, being all that premises comprised in Certificate of Title registered at Volume 1045 Folio 542 of the Register Book of Titles, (hereinafter called the said premises) are in breach of the zoning and building requirements of the Town and Country Act in respect of the use of the said premises.

It is therefore ordered that:

1. The said Diana Cooke and Deborah Ezzo, shall, on or before the 19th February, 2007, install or cause to be installed a chain-link fence, anchored in concrete at its base, and no less than four feet high, along the entire boundary between the said premises and premises known as No. 48 Constant Spring Road, in the Parish of Saint Andrew. The said fence shall have no gates, gaps or holes which would allow either vehicular or pedestrian traffic through it.

2. The said Diana Cooke and Deborah Ezzo, shall maintain and cause to be maintained, the aforementioned fence in good condition.

3. The said Diana Cooke and Deborah Ezzo, shall, on or before the 31st day of March, 2007, by themselves their servant, agents, licensees, tenants or lessees, cease all use of the said premises for commercial purposes and are hereby henceforth restrained from using the said premises for any purpose restricted by the covenants endorsed on the certificate of title for the said premises.

4. The said Diana Cooke and Deborah Ezzo, or either of them shall, on or before the 28th day of February, 2007 file in this court, and serve on the Kingston and Saint Andrew Corporation, an affidavit confirming their compliance with the order herein concerning the installation of the dividing fence, and shall, on or before the 15th day of April 2007, file in this court, and serve on the Kingston and Saint Andrew Corporation, an affidavit confirming their compliance with the order herein concerning the use of the premises.

5. Costs to the Claimant to be taxed if not agreed.