

IN THE SUPRME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 01184

BETWEEN THE PARISH COUNCIL OF MANCHESTER CLAIMANT

AND ANTOINETTE BOYNE DEFENDANT

Ms. Rose Bennett and Ms. Kemilee McClymont instructed by Bennett and Beecher-Bravo for the claimant.

Mr. Debeyo Adedipe for the defendant.

Heard: 7th and 8th May 2007

**Injunction – S. 23 Town and Country Planning Act – Personal Nature of Injunction –
Balance of Convenience**

Campbell J.

(1) The Parish Council of Manchester (Council), filed a Fixed Date Claim Form seeking injunctions

- (1)
 - (a) to restrain Ms. Boyne from carrying out any further building, engineering, mining or other operations: and /or
 - (b) any material change of use in, on, over or under land and or any building located at 26 Grove Road, Mandeville in the parish of Manchester.
- (2)
 - (a) That an injunction be granted mandating that the defendant, its agents and or servants restore the land at 26 Grove Road in the parish of Manchester to its original condition prior to its unauthorized developments.
 - (b) Complete such restoration within thirty (30) days from the date of the injunction:
and
 - (c) restore the said land to the satisfaction of the Claimant.

The Councils Case

(2) The injunction is sought by the Council pursuant to S. 23 (b) of **The Town and Country Planning Act** (the Act) Mr. Sean Rowe, Director of Planning of the Council alleges that Grove Road, is zoned for residential purposes with the exception of a few commercial users primarily in the form of child nurseries. He depones that the defendant is the registered owner of Lot 26 and has acted contrary to the Act, in that she built, engineered, mined or conducted some other operation without permission and materially changed the user of the property.

(3) He attest that on the 20th day of October 2006, an unauthorized construction of a building was observed on Lot 26, a breach report was filed. On the 9th November 2006 the defendant applied for an extension of a residential building. A second site visit was done by the Claimant at which time it was observed that the user was being converted into commercial use. The application of the claimant was refused. On the 4th December 2006 a Stop Notice was issued. The defendant has disregarded this Stop Notice. On the 23rd January 2007 the claimant issued and served an enforcement notice on the defendant, which required the defendant to cease commercial operations and to restore the lands.

(4) The notice also advised the defendant that, "if she is aggrieved by the notice, she may within fourteen (14) days of service, lodge an appeal against this notice. Importantly, it states that if the defendant lodges a notice against the appeal, any development to which the notice relates shall cease and that failure to comply with the notice may result in an application for an injunction to restrain the prohibited activity. On the 25th day of January 2007, the defendant made an application for extension of the existing building and for change of use from residential to commercial use.

(5) Mr. Sean Rowe states that prior to the unauthorized activities, 26 Grove Rd. was comprised of a single dwelling house used for residential purposes. It comprised a lawn which was unpaved and had access or a driveway towards the dwelling house. He states that it now contains 38 parking bays. The dwelling house has been expanded and extended to include living and dining room, bedroom and kitchenette, whilst the original building converted to include a lounge, bar, dining area breakfast nook, meeting and sitting area and kitchen.

The Respondent's Case

(6) Mr. Adedipe argues that the issue was of narrow compass. The issue for determination being, what does the Act treat as a development. He contended that permission was not absolutely required by the development orders. The extent of the works determined whether permission was required or not. The Court was referred to paragraph 4 of the Act which provided, inter alia;

(1) Notwithstanding the provisions of this order, development of any class specified in column 1 of the Fourth Schedule hereto may be undertaken in accordance with the conditions specified in column 2 of the said schedule in relation to such development, without the permission of the local planning authority.

(2) Nothing in this paragraph or in the Fourth Schedule shall operate so as to permit any development contrary to any condition imposed in any permission granted under Part 111 of the Law.

(7) The Fourth Schedule enumerates Development within the curtilage of a dwelling-house and exempts enlargements, improvements or other alterations of a dwelling-house, not exceeding by more than one-tenth subject to a maximum of 4,000 cubic foot.

Counsel contended that in the absence of evidence before the court of the dimensions of any extension or improvement the Court would not be in a position to say that the defendant's activities have exceeded the permissible enlargements under the Fourth Schedule.

(8) It was further urged that the applicant made applications in respect of both activities, i.e. for enlargement or improvement of the building and for material change of use. Despite the applications, these proceedings were launched against the defendant some six weeks later without consideration being given to her application.

Counsel for the respondent argued that having regard to the provision of s. 15(2) of the Act, which allows that permission may be granted retrospectively, the Council still sought to enforce the Act, instead of giving due consideration to the application. Moreover Mr. Adedipe argues the bye-laws made pursuant to **The Parish Council Building Act at Rule 4 (2)** mandates the Council to approve or disapprove plans within sixty days, and in the latter case to provide reasons for so doing, this the Council has failed to do.

(9) Counsel points out that there was a conflict between the evidence of the claimants witnesses as to the previous user of the property. He contended that there was evidence adduced by the defendant demonstrating that Lot 26 was being used as a catering establishment from as early as 1980s to the late 1990s. No enforcement notice was taken against that user then. He asked the court to reject the Council's witness, Dr. Samuels, when he states that, hitherto, there has never been any commercial activity on that premises. In respect of change of use, counsel submitted that the prohibition was from one use class to a different class, that intensification of the same activity as existed cannot constitute a material change.

Analysis

(10) The jurisdiction of the court on an application of this nature is original and not supervisory. However, the defendant may point to some defect or irregularity in the procedure adopted by the claimant in order to impugn the claimant's actions. The court must be satisfied that in granting the injunction justice is being done when the circumstances are looked at as a whole. It is an exercise of the Court's discretion.

(11) In **Wrexham County borough Council (Appellant) v Berry (Respondent) et al (2003) UKHL** at paragraph 29 Lord Bingham of Cornhill says, inter alia,

“...like every other judicial discretion must be exercised judicially. That means in this context, that the power must be exercised with due regard to the

purpose for which the power was conferred; to restraint actual and threatened breaches of planning control. The power exists above all to permit abuses to be curbed and urgent solutions provided where these are called for....Where it appears that a breach or apprehended breach will continue or occur unless and until effectively restrained by the law and that nothing short of an injunction will provide effective restraint, that will point strongly towards the grant of an injunction.”

(12) In an application for an interlocutory injunction, it is not open to the court to resolve conflict of evidence on the affidavit. Therefore the question whether Dr. Samuels evidence that Lot 26 had never had a commercial user as opposed to Mr. Trevor Reece, who stated that he had worked in a catering business at that location, is not for resolution before me. Several questions of law were raised, such as, can an intensification of the same use, bring about a material change so as to require planning permission? I have had detailed arguments before me, but that was with a view of assisting the court to determine whether the applicant had reached the threshold that is applicable in these proceedings, that there was a serious question to be tried. See **American Cyanmid v Ethicon (1975) A.C. 396.**

(13) I must abstain from making any comments on the merits of the case, I however take into account the weakness and strengths of the respective cases to determine whether the standard applicable to the applicant has been reached. The evidence that the lawn has been converted to a parking area designed to accommodate some 38 car-parking bays is an important factor. Similarly, if the court at trial accepts that a previous owner had operated a kitchen at the premises in which lunches were prepared to be transported elsewhere for consumption, that may be regarded as evidence that supports the respondent allegation that there was no change of user. If the court accepts that the claimant’s site visitor did see a large outlay of chairs, kitchen equipment, refrigeration equipment, etc, and accepts the visitor’s description of the layout as being a bar and lounge, sitting area and meeting room, that is likely to impact the defendant’s case negatively that there was no material change in the user of lot 26. I find that the threshold has been met. The Council has satisfied me that there are serious questions to be tried.

Balance of convenience

(14) I must now decide whether the balance of convenience lies in favor of granting or refusing interlocutory relief. I must consider all the circumstances of the case particularly if damages are an adequate remedy in case the Council fails at the substantial hearing of this matter. I have to keep before me that the injunction might adversely impact the defendant’s business. No question of irreparable damage has been mooted by respondent. The court attempts to balance the private rights of the respondent to deal with her property as she would wish with the rights of the public as represented by the Council, to have an orderly development. The injunctive relief sought is personal in nature.

(15) In **Wrexham County borough Council (Appellant) v Berry (Respondent) et al (2003) UkHL) 26** Lord Bingham of Cornhill, on the personal nature of injunctive proceedings quoted with approval the Enforcing Planning Control: Good Practice Guide for Local Planning Authorities(1997), the Department of Environment, Transport and the Regions, which states;

“Unlike an enforcement notice or stop notice, a planning enforcement injunction is not primarily directed at the parcel of land on which the breach of control is taking place. Injunctive proceedings are “personal” in the sense that the LPA seeks to obtain an order from the court to restrain a person, or a number of people, who must each be cited by name in the LPAS application, from carrying on the breach. It follows that in assessing what is called the balance of convenience, the decision whether to grant injunctive relief on the LPA application, the court will have to weigh the public interest (which the LPA represents) against the private interest of the person or people who the LPA seek to restrain. This differs from, for example, the process of an enforcement appeal where the decision maker is concerned with whether the appeal should succeed on its legal or planning merits. And, even if the court concludes that an interlocutory injunction should be granted, its effect may be suspended for a specified period so the defendant has time in which to make suitable alternative arrangements for whatever activity is to be restrained.”

(16) The defendant initially did not apply for a change of user, and is still of a mind that such an application is unnecessary, this despite making such an application a couple days after the enforcement notice was served on her. She claims to having been laid off from her employment at Windalco, she has joint-ventured with her mother, a pensioner to start this business. An injunction is likely to cause a laying off of her employees, with the consequential statutory payments to be paid by the defendant and the loss of income. The facility that is presently used in this business no doubt could be restored to a dwelling house and earn an income by way of rental. Similarly, the equipment may be equally useful in another location. It is clear that damages would provide adequate compensation should the respondent succeed at trial. No doubt has been expressed as to the ability of Council to meet those damages.

(17) There is no doubt that, if the business remains, the residential comforts that were hitherto enjoyed by the community are likely to wane. The peaceful and quiet enjoyment of their homes will not be facilitated by the respondent's bar and lounge. The nurseries and Heart Institution would be expected to be closed at nights and on weekends. However the respondent's business would expect to entertain her customers well into the nights and on weekends. The claimant alleges that there is likely to be a depreciation in the property values, and with the commercialization, an increase in criminal activity. This is real hardship on a community that on the evidence has existed for in excess of three decades

(18) The defendant's first application did not admit to a change of user, and subsequently refused to obey a stop order from the council. Persons of like mind as Ms. Boyne are likely to be emboldened by her actions, should the Council's application be refused. In the result, the enforcement of the Act would become virtually impossible and the public interest as represented by the Council disregarded. Damages would not adequately compensate the Council, should they succeed at trial. In all the circumstances of this case, the court is of the view that the balance of convenience rest in favour of the Council. The Court grants the order sought in paragraph 1 of the Fixed Date Claim Form dated 12th March 2007. Paragraph 2 is refused. Paragraph 3 – the

injunction is suspended until 25th May 2007 to enable the defendant to regularize her staff and matters consequent on the closure of her business. Costs to the Claimant to be agreed or taxed.