In the Supreme Court

Before: The Chief Justice
Mr. Justice Melville
Mr. Justice Robotham

Suit No. M. 9 of 1975

R. v The Tribunal of Appeal established by the Kingston and Saint Andrew Building Act and

Mack Investments Ltd.

Ex parte The Building Authority

Lloyd Barnett for Applicants

R. Mahfood, Q.C., and Glen Miller for Respondents.

1975 - November 20, 1976 - February 3.

Smith, C.J :

On October 24, 1973, the applicants, the Building Authority established by the provisions of the Kingston and St. Andrew Building Act (formerly, the Kingston and St. Andrew Building Law, Cap. 191), refused an application by the respondents, Mack Investments Ltd., for permission to erect a building at No. 70, Pembroke Hall Drive in the parish of St. Andrew, which they intended to use as a petroleum filling station. Permission was refused on the ground that the class, type and design of the building were unsuitable to the locality. The respondents appealed against this decision to the tribunal of appeal established by the Act. The tribunal, after hearing the parties, found that the decision of the Building Authority was unreasonable and allowed the appeal. The applicants (hereinafter "the Authority") now seek an order of certiorari from the court for removal of the decision of the tribunal of appeal into the court to be quashed. The grounds upon which this relief is sought are that the decision of the tribunal was wrong in law and was in excess of, or without, jurisdiction.

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The decision of the court on this application depends entirely on the proper construction to be placed on the provisions of s.10 of the Kingston and St.Andrew Building Act. It is a long section but it is necessary to set it out in full. The section provides as follows :

" 10.-(1) 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

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> 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 approvod plan.
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> (2) 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. "

It will be seen that the entire proceedings giving rise to the application with which we are now concerned, from the respondents' application to the Authority through to the hearing and decision of the tribunal of appeal, are governed by the provisions of s.10.

Section 2 defines "the Building Authority" as meaning "the Council of the Kingston and St. Andrew Corporation appointed and constituted under the provisions of the Kingston and St. Andrew Corporation Act ..... " "The Surveyor" is "the City Engineer appointed under the Kingston and St. Andrew Corporation Act ....." and "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."

It was submitted on behalf of the Authority that in respect of the approval of the erection of buildings, s. 10 deals with two different types of functions, viz: (a) technical approval of the drawings and (b) the general question of the suitability of buildings to localities.

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On the technical question whether the drawings are adequate or suitable, an applicant, it was said, may obtain the approval of the surveyor or the Authority and if he fails he may appeal to the tribunal of appeal and obtain the approval of that tribunal. Where, however, the Authority does not approve an application because in its opinion the class of building and its general features and design are not suitable to the locality there is no right of appeal.

In support of this contention for the Authority, it was submitted that in construing s.10 one has to take into account the nature of the functions, the way in which the power has been described in the statute and the composition of the person or institution to which the power is entrusted. It was argued that in the case of the determination of technical drawings the surveyor, who is an engineer or a person with technical training, is given the statutory power to approve the drawings and it is logical that a review of his decision on that question could be undertaken by the tribunal of appeal which, as defined, is a person who, in the general administration of the Country, occupies a senior technical position. By contrast, the argument continued, the discretion in relation to suitability of the building to the locality is given to an elected body and is couched in general terms; it is based upon the subjective determination by the local representatives of the municipality of what is suitable to the locality. It was said that it would be absurd and, in any event, difficult to assume that the legislature intended that a review of that sort of decision by such a body should be undertaken by the Chief Technical Director or his nominee.

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For the respondents, it was submitted that two types of approval are contemplated by s.10, not three. The two are: approval of the Building Authority and approval of the tribunal of appeal. These, it was said, are the only types of approval which can relieve a builder of the penalty provided. It was submitted that although s.10(1) uses the word "approval" in relation to the surveyor, his approval is not approval for the section when read as a whole. It was argued that the first proviso to s.10(1) and the scheme of the Act, particularly ss. 16. 17 and 25(1)(u), contemplate that in any event, whatever the surveyor may purport to do by way of preliminary approval of drawings, the legal approval is that of the Authority, who have the right themselves to require detailed drawings and to whom the surveyor is a technical adviser. It was submitted that what the Act contemplates is that from the decision of the Authority, refusing approval, an appeal would lie to the tribunal of appeal and the matter is then at large before that tribunal.

I agree with the respondents' contention that in respect of the erection, re-erection or extension of a building only two approvals can provide relief from the prescribed penalty. Section 10(2) says expressly that there must be written approval either from the Building Authority or the tribunal of appeal. It was contended by learned counsel for the Authority that references in s.10(2) and in s.16 to the Building Authority must be read as including the surveyor. I do not agree. In my opinion, they do not include the surveyor, as such. The surveyor is a technical officer in the employment of the Kingston and St. Andrew Corporation, the Council of which is the Building Authority. By s.10(1) a person proposing to erect, re-erect or extend a building must give notice, accompanied by plans, to the Building Authority, not the surveyor. The surveyor is required to approve of the plans

and to notify his approval in writing to the builder, but the proviso to s.10(1) requires that the plans be placed before the Authority for their opinion on the question of suitability of the building to the locality before he can notify his approval.

Although there is an apparent conflict between the provisions in s.10(1) that the surveyor shall notify his approval in writing and those in s.10(2) that the written approval of the Building Authority must be obtained, it seems clear from s.16 that there is only one approval, namely, that of the Building Authority. This section provides that "the approval of the Building Authority of any plans or particulars.... shall be signified by writing, under the hand of the Surveyor,.....and countersigned by the Clerk or Secretary of the Building Authority and shall bear the date of such approval." This, obviously, is the written approval to which reference is made in s.10(2),which can hardly be referring only to approval of the Authority after submission to them of a dispute under s.10(1). Unless approvals of the surveyor under s.10(1) are given in the name of the Authority and signified in the manner prescribed in s.16, they are worthless in the hands of those to whom they are given as they would afford no protection from the penalty prescribed in s.10(2). Where the approval of the surveyor, as such, provides relief from a penalty, the Act says so expressly. S.22 provides that "no public building shall be used as such, until the Surveyor, or the tribunal of appeal, shall have declared his approval of the construction thereof, and of its suitability for the purpose for which it is proposed to be used". S.25 makes it an offence, and provides a penalty, for any person to act contrary to, or to fail to comply with, any of theprovisions of the Act, which would include s.22.

The view that the approval which the surveyor gives under s.10(1) is the approval of the Authority is strengthened by the

fact, as will be seen later, that the provisions in s.16 ante-dated those provisions in s.10(1) whereby disputes with the surveyor are submitted to the Building Authority. Formerly, the written approval of the Authority required by s.10(2), could only have been the approval which the surveyor, as agent or servant of the Authority, was required to give by provisions identical in terms to those in s.10(1). Now, of course, s.16 applies both to the approval which the surveyor gives in the name of the Authority and that which the Authority give on submission of a dispute to them.

It is important to observe that s.10(1) does not provide for two separate approvals - one from the surveyor in respect of the drawings and the other from the Authority in respect of the suitability of the class of building etc. to the locality or neighbourhood - as is contended by counsel for the Authority. Except in a case of dispute, there is one approval only, namely, that by the surveyor, acting for the Authority. But he must first obtain the opinion of the Authority on the question of the suitability of the class of building etc. to the locality or neighbourhood. This is the plain meaning of the words in the first part of the first proviso to s.10(1): "Provided always that no plans shall be approved as hereinbefore mentioned unless the class of building .....are in the opinion of the Building Authority suitable to the locality or neighbourhood .....".

Before dealing with the rest of the argument which was addressed to us, I think it will be helpful to look at the legislative history of s.10. The Kingston Building Law, 1883 (Law 5 of 1883) was, apparently, the first statute which made provisions regulating the erection of buildings in Kingston. This law contained no provisions similar to those of s.10 of the current statute. By Law 24 of 1907, the Law of 1883 was amended by the inclusion, inter alia, of provisions setting out the

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procedure to be adopted by persons proposing to erect or re-erect buildings and a penalty for a breach of the prescribed procedure. Those provisions, contained in a new s.5, are in terms identical to those of the existing s.10, with the following exceptions: s.10(1)(c) and the provisions in the first proviso relating to the class of buildings and the frontage, elevation and design being suitable to the locality or neighbourhood were not included; the dispute which under s.10(1) is now submitted to the Authority then went directly to the tribunal of appeal; instead of the words "or cause or procure the erection, re-erection or extension" now appearing in s.10(2), Law 24 of 1907 had the words "or give directions for the erection or extension". These excepted provisions from Law 24 of 1907 were added by the Kingston Building Law, 1914 (Law 18 of 1914), the preamble of which stated as follows: "Whereas it is desirable in the interests of residential and other localities that the Building Authority for the parish of Kingston should have power to regulate and control the class, design and structure of buildings suitable to such localities:". This latter statute repealed s.5, as inserted by Law 24 of 1907, and substituted a a new section in terms identical to the existing s.10, with one exception. By the Law of 1914, the opinion of the "Surveyor or of the Building Authority" was required as to the suitability of the class of building etc. to the locality or neighbourhood. This authority of the surveyor was removed by subsequent legislation (see the Statute Law Revision Law - Law 20 of 1937). S.12 of Law 24 of 1907 also introduced provisions identical in terms to s.16 of the existing Act (save for words added in 1957 which are not relevant).

The legislative history of s.10 shows that in the original enactment in 1907 a dispute could only arise in respect of the technical aspects of plans submitted to the Authority.

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Any such dispute arising between the surveyor and an applicant for approval of the plans was submitted directly to the tribunal of appeal. After the amendments were made by Law 18 of 1914, disputes under sub-section (1) were to be submitted to the Authority instead of the tribunal of appeal. In my opinion, the dispute which, after the amendment in 1914, was required to be submitted to the Authority was that which formerly went to the tribunal of appeal directly, namely, a dispute between the surveyor and the applicant about the technical aspects of the plans. This is so because the question of the suitability of the class of building etc. to the locality or neighbourhood would only arise after the surveyor had approved the drawings. An added reason is that a dispute between an applicant and the Authority about the class of building could hardly be submitted to the same Authority for decision. After the submission of a dispute to the Authority, they are required to decide the technical issue in dispute. If the technical issue is decided in favour of the applicant, thus over-ruling the surveyor, the other question, namely, the suitability of the building to the locality, would then arise for the Authority's decision.

As I have said, it is contended by learned counsel for the Authority that only a dispute regarding the technical aspects of the plans may be submitted to the tribunal of appeal. I do not think that I would be justified in so interpreting the section. It would involve reading words into sub-section (2). The argument that it could never be intended that a single technical officer should have the power of review over the subjective decision of the elected body of the municipality is very compelling but, in my view, it is not sufficient by itself to warrant my reading words into the statute. The legislature had the opportunity when the amendments were made

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in 1914 to make it clear, if that was the intention, that an appeal from the decision of the Authority must be limited to technical issues. They did not do so and in the present state of the Act there is nothing to indicate that that is what they intended. On the face of it, an applicant who fails to obtain the written approval of the Authority and disputes the Authority's decision is given the right, without restriction, to have the dispute submitted to the tribunal of appeal. In my opinion, this right cannot be restricted in the manner contended in the absence of provisions in the Act from which an intention so to restrict it arises by necessary implication.

The Authority relied on statements, both in parenthesis, by Clark, J. in R. v The Kingston and St. Andrew Corporation, Ex parte Godfrey (1934) 2. J. L. R. 23 in support of the contention just discussed. Referring to the decision of the Corporation, as the Building Authority, in respect of the suitability of the class of building in that case to the particular locality, Clark, J. said, at p. 45 :

> " That is a question of fact with the decision of which the Corporation is by law entrusted (subject to a possible right of appeal to the "tribunal of appeal" existing under the Building Laws for appeals on technical matters of construction)."

On the following page the learned judge said :

> " Certain statutory rules, made under section 19 of Law 24 of 1907 and published in the Gazette of 7th July, 1932, recognise the rights of opponent (sic) to be heard (on technical matters) before the Tribunal of Appeal. "

The jurisdiction of the tribunal of appeal did not arise for consideration or decision in that case; nor, as far as the report of the case shows, did the reference to the tribunal's jurisdiction have any relevance to anything that was in issue before the Full Court, which was hearing an application for the issue of a writ of certiorari. The statements in parenthesis are, therefore,

clearly obiter dicta and, as was submitted for the respondents, the point was probably not argued. Lyall-Grant, C.J., and Brown, J., the other members of the court, did not refer to this question in their judgments.

There is nothing in the "statutory rules" referred to in the second passage quoted above which recognises the right of opponents to be heard only on technical matters. The words in parenthesis seem merely to be a repitition of the view expressed in the previous passage. The regulations of 1932 (which Clark, J. called "statutory rules") were made in pursuance of powers given in the statute to the Authority to make regulations regulating the procedure to be followed by the tribunal of appeal. Regulation 3 provides for the service of notices of appeal on persons who were heard by the Authority in opposition to building applications and for them to give notice of their intention to oppose the appeal. Regulation 8 provides for the active participation of the objectors in the proceedings at the hearing before the tribunal. Prior to 1914 there were no statutory provisions whereby anyone could object to the approval of plans by the Authority. Up to that time, as I have said previously, only the technical aspects of plans were considered by the Authority or the tribunal of appeal. The amendments made by Law 18 of 1914 introduced the suitability of classes of buildings to localities for the Authority's consideration and it appears that a practice developed which allowed adjoining owners and occupiers to appear and be heard before the Authority in opposition to the approval of plans on the ground that particular classes of buildings were not suitable to their localities. The existence of this practice is shown by the facts in the Ex parte Godfrey case. Those facts show that in 1933 the Authority allowed adjoining residents to appear before them and to oppose an application for the erection of a petroleum filling station in their neighbourhood,

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which they claimed to be residential. Up to that time they had no statutory right to oppose the application. It was not until June 1934 that the Authority was empowered (see Law 11 of 1934) to make regulations for the giving of notices to adjoining owners and occupiers of applications for the erection of buildings, and prescribing the terms upon, and manner in, which they may oppose the approval of plans for any particular class of buildings and be heard in support of their objections. Those regulations were made in June, 1938, (see Jamaica Gazette of September 15, 1938). Although the regulations of 1932 were made prior to Law 11 of 1934, it seems clear that they were made by the Authority with the existing practice of hearing objectors in mind and they amount to an acknowledgement by the Authority of the jurisdiction of the tribunal of appeal to hear appeals relating to the suitability of classes of buildings to localities.

It is logical that the tribunal of appeal, a technical expert, should be limited to deciding technical matters. This is how it was up to 1914. Perhaps without the benefit of argument, and certainly without the consideration which a relevant issue ordinarily receives, Clark, J. may have merely stated what he regarded as logical rather than the result of a careful analysis of the provisions of the section. I do not regard the Ex parte Godfrey case as satisfactory authority for the contention which it was cited to support.

I deal, finally, with the submission on behalf of the Authority that there is no appeal to the tribunal of appeal unless there has been a dispute between the surveyor and an applicant which is submitted to the Authority. At one stage, during the anxious consideration which the complex provisions being construed demanded, I was of the view that this submission

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was right. I am, however, now of the clear opinion that it is without merit. Whether the approval of plans under s. 10(1) is issued at the level of the surveyor or at the level of the Authority itself, after appeal from the surveyor, it is the approval of the Authority which is issued. Section 10(2) gives an applicant a right to obtain the approval of the tribunal of appeal if he fails to obtain approval of his plans under s. 10(1) and he disputes the decision whereby his application was refused. An adverse decision of the surveyor which is disputed and submitted to the Authority is not a decision of the Authority, it is a decision of the surveyor. At his level it only becomes the Authority's decision when he approves the drawings and the Authority give their opinion on the suitability of the class of building to the locality or neighbourhood. But once the unfavourable decision is, legally, that of the Authority, it does not matter, in my view, for purposes of an appeal under s.10(2), at what level the decision was made under s.10(1).

It was admitted on both sides during the argument, and confirmed throughout the consideration of this judgment, that s.10 of the Act is extremely difficult to construe. The form of drafting, particularly where a right of appeal is given as relief from a penalty, is archaic and steps should be taken to reframe and clarify its provisions.

In my judgment, for the reasons I have endeavoured to give, the tribunal of appeal had jurisdiction to entertain the respondents' appeal. This is the only ground which was argued in support of the application before us. I would dismiss the application with costs.

Melville, J :

I agree :

Robotham, J :

I agree :