JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28/99

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	VERON SIMPSON	APPELLANT
A N D	THE TOWN AND COUNTRY LOCAL PLANNING AUTHORITY OF THE K.S.A.C.	RESPONDENT

Berthan Macaulay, Q.C. and Akin Adaramaja instructed by Margarette May Macaulay for the appellant

Carol Davis and Rose Bennett instructed by Davis Bennett and Beecher-Bravo for the respondent

May 2, 3 and June 25, 2001

DOWNER, J.A.

This appeal emanates from the Appeal Tribunal (Mr. Carlton Melbourne, Mr. Christopher Lue and Miss Pauline McHardy) established pursuant to Sec. 22A of the Town and Country Planning Act (the "Act"). It seeks to quash the enforcement notice served on Mr. Veron Simpson of 16 Primrose Terrace, Kingston 10.

Mr. Simpson the appellant was aggrieved by the Tribunal's dismissal of his appeal and has invoked the jurisdiction of this Court to reverse the Order by quashing the enforcement notice on the basis that it was invalid. The principal ground in the Amended Notice of Appeal reads:

> "(1) That the Tribunal failed to recognise the invalidity of the Enforcement Notice in that the

> Enforcement Notice did not "require such steps as may be specified in the notice to be taken **within such period as may be specified** for restoring the land to its condition before the development took place or for securing compliance with the conditions as the case may be" as required by section 23(2) of the Town and Country Planning Act."

The issue therefore is the true construction of sec. 23(2) of the Act as it relates to the enforcement notice dated 14th May 1998, and issued by the Local Planning Authority which in this instance is the Council of the Kingston and St. Andrew Corporation.

The construction of section 23(2) of the Act

Section 23(2) of the Act reads:

> "Any notice served under this section (hereinafter called an "enforcement notice") shall specify the development which is alleged to have been carried out without the grant of permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, and in particular any such notice may, for the purpose aforesaid, require the demolition or alterations of any buildings or works, the discontinuance of any use of land, or the carrying out on the land of any building or other operations and shall state that any person upon whom an enforcement notice is served is prohibited from continuing or carrying out any development or operations or using the land in respect of which the notice is served." [Emphasis supplied]

Be it noted that Section 23(1) of the Act which will be cited hereafter, states the circumstances which will give rise to the issue of a notice. Section 23(2) states conditions which must be incorporated in the notice. Once steps

are required to be taken, pursuant to section 23(2) there is a discretion coupled with a duty; see **Padfield v. Ministry of Agriculture** 1968 A.C. 997.

As regards the enforcement notice paragraphs 1 and 2 recites the Nature of the Contravention and Prohibition. They read thus:

> "1. Nature of Contravention
>
> **WHEREAS** you have contravened or caused a Contravention of the Town and Country Planning Act, 1957 and the Town and Country Planning (Kingston) (Confirmed) Development Order, 1965.
>
> **AT 16 PRIMROSE TERRACE, KINGSTON 10**
> By the following development, that is to say:-
>
> i. **YOU HAVE CHANGED THE USE OF RESIDENTIAL BUILDING AND LAND BY OPERATING AN OFFICE**
>
> ii. **YOU HAVE ERECTED AN EXTENSION TO THE REAR OF THE BUILDING AND LAND WITHOUT THE GRANT OF PERMISSION**
>
> **2. Prohibition Regarding Use of Land and Contravening of Conditions**
>
> **YOU ARE PROHIBITED FROM;**
>
> **(a) Continuing or carrying out any development or operations or using the land in respect of which this Notice is served**
>
> **(b) Continuing the contravention of the conditions subject to which permission was granted."**

These two paragraphs in the Enforcement Notice are in compliance with that part of sec. 23(2)which reads:

> "Any notice served under this section (hereinafter called an "enforcement notice") shall specify the development which is alleged to have been carried out without the grant of permission as aforesaid or, as the case may be, the matters in

> respect of which it is alleged that any such conditions as aforesaid have not been complied with..."

The crucial paragraph of the Notice states:

> **"3. Steps to be Taken**
>
> **YOU ARE HEREBY REQUIRED from the date on which this Notice takes effect to take the following steps:-**
>
> **i. DISCONTINUE THE UNAUTHORISED USE OF THE BUILDING AND LAND AS AN OFFICE**
> **ii. REMOVE ALL MACHINERY AND EQUIPMENT ASSOCIATED WITH THE DEVELOPMENT**
> **iii. RESTORE THE BUILDING AND LAND TO RESIDENTIAL USE**
> **iv. DEMOLISH THE EXTENSION ERECTED TO THE REAR OF THE BUILDING AND LAND WITHOUT THE GRANT OF PERMISSION."**

The relevant part of sec. 23(2) referred to earlier reads:

> "... and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place."[Emphasis supplied]

It was contended that the failure to comply with this part of the statute made the notice invalid.

Be it noted that the date on which the notice takes effect is provided for in sec. 23(3)(a) and (b) and will be adverted to later. Further the final portion of section 23(2) states:

> "...or for securing compliance with the conditions, as the case may be, and in particular any such notice may, for the purpose aforesaid, require the demolition or alterations of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations and shall state that any person upon whom an enforcement notice is served is prohibited from continuing or

> carrying out any development or operations or using the land in respect of which the notice is served."

The first question to be answered in determining the validity of this enforcement notice is, when does it take effect? So it is necessary to turn to the notice and see what it says. It states in paragraph 4 as follows:

> **"4. Effective Date of Notice**
>
> **THIS NOTICE TAKES EFFECT subject to paragraph 5."**

Then paragraph 4 continues thus:

> "(a) In the case of the discontinuance of use of land, at the expiration of twenty eight (28) days after the date of service.
>
> ...
>
> (c) In any other case at the expiration of three (3) days after the date of service."

This is the only period specified in the notice.

Paragraph 5 relates to instances where there is an appeal, and reads thus:

> "5. Appeal
>
> If you are aggrieved by this Notice you may (pursuant to Section 23A of the Act) appeal against the Notice to the Appeal Tribunal within twenty eight (28) days of service.
>
> If you lodge an Appeal all building, engineering or mining operations on the land shall cease and this Notice shall not take effect pending the final determination of the appeal."

It is appropriate at this stage to deal with the issue raised in ground one of the Amended Notice of Appeal. The complaint is that there was no specification in the notice as to the time within which the land should be restored to its original state. This omission, Mr. Berthan Macaulay Q.C.

contended, made the notice invalid. It was raised before the Tribunal and acknowledged thus in its reasons at page 76 of the record:

> "There were two points to be considered. The first is whether the notice is bad, invalid and ought to be quashed and set aside; secondly whether the user is a permitted user under the Town and Country Planning Act."

In these reasons the case of **Burgess v Jarvis** [1952] 1 All E.R. 592 was considered. Then the reasons continued thus on the same page:

> "...I think Lord Justice Sommervell is very clear in his judgment when he says at page 595 A & B 'in my opinion the effect of section 23 is that there are two periods, each of which has to be specified in the notice' and because their notice system also states that if a notice is served on you and you make an application or an appeal, that the notice is suspended. There are no such provisions in Jamaica where there is an appeal, that the operation of a notice is suspended and for that reason they had to conclude on the particular interpretation of the provisions of that English Legislation, that two periods must be specified in the notice, because you must know that one period runs to say when you must take the steps and after that period, another period starts to run again when the notice is effective; and they had to construe their Act in that way. I don't think we have to construe our Act in that way and therefore there is no need to specify any two periods."

In order to resolve the issue, the plain language of sec. 23(2) of the Act should be stressed to then determine the effect of all the subsections so as to ascertain whether the reasoning of the Tribunal which was supported by Ms. Carol Davis for the respondent, is the correct way to interpret the Act.

The first sub-section after 23(2) of the Act is 23(2A). Since this sub-section makes reference to sec. 23(1) it is necessary to set it out so that the scope and limits of sec. 23 can be measured. Sec. 23(1) reads:

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

Part III of the Act referred to sec. 23(1) and deals with the Contents or Effects of Development Orders. The relevant Development Order is the Town and Country Planning (Kingston) (Confirmed) Development Order 1965 published in the **Jamaica Gazette Supplement Proclamations Rules and Regulations of Friday July 22, 1966.** Be it noted that five years after any development takes place without permission or that where permission is granted and the conditions are not complied with any enforcement notice is invalid.

Did the provisions in sections 23(2A) and 23A eliminate the requirement to state in the Enforcement Notice such period as may be specified for restoring the land to its condition before the prohibited development took place?

It would be extraordinary for Parliament to insert the 1993 amendment of sec. 23 in the Act and then at the same time by sub-section 23(2A) and 23A derogate from the protection accorded to the land owner by the

enforcement notice pursuant to section 23(2). That protection is to have a specific period stated in the enforcement notice within which the land owner is required to restore, demolish, alter those breaches stated in the enforcement notice. The specific period must be after the enforcement notice takes effect.

Yet the contrary view was argued with great force by Ms. Carol Davis for the respondent. More particularly, she interpreted section 23(3) as a mere specification or elaboration of the period referred to in sec. 23(2). She contended that only one period was required. That period she stated was when the notice takes effect and she submitted that, that was stated in the notice in paragraph 4 (supra). So the sub-sections must be examined with particularity to see what meaning ought to be attributed to them.

Section 23(2A) reads:

> "Where a local planning authority, the Government Town Planner or the Authority serves an enforcement notice under subsection (1), the local planning authority, the Government Town Planner or the Authority, as the case may be, shall cause a copy of the enforcement notice –
>
> (a) to be posted in a conspicuous place on the development or on the land where the development is being carried on; and
>
> (b) to be published in a daily newspaper printed and circulating in Jamaica.

Then section 23(3) (a) and (b) provides for the period when the notice takes effect. This is the other period which must be stated in the notice. It was the only period so stated to. What was lacking in the notice was the period required by sec. 23(2). In the proviso there is an automatic stay of execution when there is an appeal. It reads:

> "(3) Subject to section 23A, an enforcement notice shall take effect –
>
> (a) in the case of the discontinuance of use of land, at the expiration of twenty-eight days after the service thereof;
>
> (b) in any other case, at the expiration of three days after the service thereof:
>
> Provided that where an appeal is lodged pursuant to section 23A any building, engineering or mining operations on the land shall cease and the enforcement notice shall not take effect pending the final determination of the appeal."

It is essential to note that before the contents of the enforcement notice can take effect, the notice must be valid.

For an "enforcement notice" to be valid it must state a specific period for restoring the land to its condition before the prohibited development took place. That is the mandatory requirement of section 23(2) supra and it is convenient to reiterate the specific wording:

> "...and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition, before the development took place."

It is reasonable to envisage that such a period so specified may be shorter than the time it would take for the dispute to be finally resolved by the highest court, or the legal system could act with such promptitude, that the appeal process is completed before the time specified in the enforcement notice. What is important is that the period must be specified and the time specified must be reasonable having regard to the nature of the prohibited development. No such period was specified in the instant notice.

Turning to section 23A(1) (2) and (3) it reads as follows:

"23A.-(1) If any person on whom an enforcement notice is served pursuant to section 23 is aggrieved by the notice, he may within twenty-eight days of the service of the notice appeal against the notice to the Tribunal.

(2) Where an enforcement notice requires the cessation of work in any development to which the notice relates, then every appeal lodged under subsection (1) shall have affixed to it a certificate from the Government Town Planner certifying that the work has ceased in conformity with that notice.

(3) The Tribunal shall not hear an appeal where the certificate is not affixed to the appeal in accordance with subsection (2)."

Then as to the powers accorded to the Tribunal, section 23(4) reads:

"(4) On hearing an appeal the Tribunal shall –

(a) quash the notice if satisfied that permission was granted under this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with;
or
(b) vary the notice if not so satisfied but satisfied that the requirements of the notice exceed what is necessary for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; or
(c) in any other case, dismiss the appeal."

Then the proviso reads:

"Provided that where the enforcement notice is varied or the appeal is dismissed, the Tribunal may, if it thinks fit, direct that the enforcement notice shall not take effect until such date (not being later than twenty-eight days from the determination of the appeal) as the Tribunal may specify.

> (5) A person who is aggrieved by a decision of the Tribunal may appeal against that decision to the Court of Appeal."

In this case, to use the words of the Tribunal, "it disallowed the appeal". It was the failure of the Tribunal to quash the enforcement notice, that has given rise to the proceedings in this Court. The Tribunal failed to see that the enforcement notice was invalid because of its reluctance to construe section 23 of the Act in its entirety. If the enforcement notice is invalid, then the Tribunal cannot hear and determine the merits of the case. The basis on which the Tribunal is empowered to quash an invalid notice is by resorting to its inherent power with which every court or Tribunal is endowed. The Tribunal cannot adjudicate on an enforcement which is null and void.

To my mind, there was no derogation from the mandatory requirement stipulated in sec. 23(2) of the Act: more particularly, to state in the enforcement notice the period within which to take steps to demolish the extension of the building for which permission had not been granted. The answer to the question posed at the beginning of this section is in the negative.

Are there any internal aids in Part V of the Act which assist in the construction of section 23(2)?

Section 24 (1) and (2)of the Act reads:

> "(1) If within the period specified in an enforcement notice, or within such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps, and may recover as a simple contract debt in the Resident Magistrate's Court of the parish in which the land is situated, from the person who is then the owner of the land, any expenses reasonably incurred by them in that

> behalf; and if that person, having been entitled to appeal to the Tribunal under section 23A, failed to make such an appeal, he shall not be entitled in proceedings under this subsection to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such appeal.
>
> (2) Any expenses incurred by the owner or occupier of any land for the purpose of complying with an enforcement notice served under subsection (1) of section 23 in respect of any development, and any sums paid by the owner of any land under subsection (1) in respect of the expenses of the local planning authority in taking steps required to be taken by such notice, shall be deemed to be incurred or paid for the use and at the request of the person by whom the development was carried out."

It could be successfully contended that if the K.S.A.C. sought to recover expenses in the Resident Magistrate's Court reasonably incurred, then the land owner Mr. Simpson, would have had a valid defence. He would have had a valid defence because he had appealed to the Tribunal challenging the validity of the notice.

The current notice states in paragraph 6 the possibility of recovery proceedings, but there was a failure to state in paragraph 3 of the notice (supra) the period within which the land owner was to restore the land to its original state before the prohibited extension took place. That failure meant the notice was invalid.

Paragraph 6 reads:

> **"6. Entry on Land by Local Planning Authority**
>
> If you fail to take the steps required by this Notice to be taken (other than the discontinuance of any use of the land) the Local Planning Authority may enter on the land and take those steps and may file suit in a Resident Magistrate's Court for the recovery

of any expenses reasonably incurred by them in that behalf."

Once the appellant had shown that he had challenged the validity of the Notice before the Tribunal paragraph 6 could not be enforced. The invalid enforcement notice would be a good defence.

The final paragraph of the enforcement notice reads:

> **"7. Penalty for Failure to Comply**
>
> (a) Where you are required by this Notice to discontinue the use of land or comply with any conditions in respect of the carrying out of any operations on the land and you fail to do so (without the grant of permission)and use the land or cause or permit the land to be used, or carry out or cause or permit to be carried out those operations in contravention of the Notice, you shall be guilty of an offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding Twenty Five Thousand Dollars ($25,000.00), or in default of payment to imprisonment with hard labour for a term not exceeding Twelve (12) months, and
>
> (b) If the use is continued after the conviction, you shall be guilty of a further offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding Five Thousand ($5,000.00) for every day on which the use is so continued or in default of payment the Resident Magistrate shall make an order for the interest in the land to be forfeited to the Crown, and
>
> (c) if the use is continued after the second conviction, you shall be guilty of a further offence and on summary conviction before a Resident Magistrate your interest in the land shall be forfeited to the Crown."

This paragraph is permitted by virtue of section 24(3) of the Act which reads:

> " Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the

> carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under Part III, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding twenty-five thousand dollars, or in default of payment to imprisonment with hard labour for a term not exceeding twelve months, and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars for every day on which the use is so continued, or in default of payment the Resident Magistrate shall make an order for the interest in the land to be forfeited to the Crown, and if the use is continued after the second conviction, he shall be guilty of a further offence and on summary conviction before a Resident Magistrate the interest in the land shall be forfeited to the Crown."

Here again the enforcement notice must be valid if the criminal sanctions are to be imposed. The important case of **Chiltern District Council v. Hodgetts** [1983] 1 All E.R. 1057, shows how the House of Lords treats informations drafted in contravention of section 24(3) supra. See also **Mead v Plumtree** which will be cited later. It must be emphasized that Chapter III of the Constitution enshrines Fundamental Rights and Freedoms, and, rights of property are protected in Section 18. One of the exceptions to the right of compensation is for compulsory possession or acquisition of property by the Crown stated thus in Section 18(2) (h):

> "(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property -
> ...

(h) in the execution of judgments or orders of courts."

So for the drastic civil and criminal remedies in section 24 to be effected, the enforcement notice must comply with the provisions of sec. 23(2) of the Act. This is why a reasonable time must be stated for any demolition required by the Local Planning Authority. This time must be way in excess of the 28 or 3 days referred to in sec. 23(2) of the Act.

What do the authorities ordain?

The Town and Country Planning Act is modelled on its English counterpart by the same title, so **Burgess v Jarvis** (supra) is of direct assistance. Somervell L.J. stated at page 595:

> "In my opinion, the effect of s. 23 is that there are two periods, each of which has to be specified in the notice. The first in point of time, though it comes later in the section, is the period under s. 23(3), that is, the period at the expiration of which the enforcement notice takes effect. The second, which arises under s. 23(2), is the period, also to be specified, within which the specified steps for restoring the land, and so on, have to be taken. It is plain that the second of those periods does not start until the first has expired and the notice has taken effect. That seems to me the plain meaning of the words, and, if one considers them in their context, the reason for the first period is obvious. The first period is that during which the notice can be challenged, permission can be asked for, and any person aggrieved can appeal. The owner or occupier or both may want to appeal, and one, therefore, would expect a period for appeal during which the notice is ineffective. That period must be not less than twenty-eight days. It may be prolonged if there is an appeal under the provisions which I have read, and the date of taking effect is suspended. If the appeal is dismissed, the notice takes effect subject to a power in the proviso to s. 23 (4) enabling the court to say that it shall not come into force until a further date, not being later than twenty-eight days. It is unnecessary to consider for what precise purpose that proviso was inserted, because it does not, to

> my mind, affect the general construction." (Emphasis supplied)

This reasoning is applied to our own Act despite the reasoning of the Tribunal and the strong support given to it by Ms. Davis.

During the same year in which **Burgess** [1952] 2 All E.R. 592 was decided Lord Goddard in the Divisional Court in criminal proceedings followed it in **Mead v Plumtree** [1952] 2 All E.R. 723 and said at page 725:

> "...Counsel for the respondent has suggested that the notice should be read as meaning that the notice will take effect in twenty-eight days and that the appellant has twenty-eight days in which to do the work. We cannot hold that that is what the notice says or that that would comply with the section, and that is the opinion expressed by the Court of Appeal in **Burgess v. Jarvis** [1952] 2 All E.R. 592, Counsel for the respondent said that, as this was a criminal case, we were at liberty to disregard the decision of the Court of Appeal in **Burgess v. Jarvis,** but I should be sorry to disregard a decision of the Court of Appeal merely because we are sitting on an appeal from justices and the Court of Appeal were sitting on an appeal from a judge in chambers in a civil proceeding. Moreover, not only should I not feel at liberty to do so, but this section can only be construed in one way – that a notice must contain two dates, i.e., the date when the notice is to take effect (which must be not less than twenty-eight days from the service) and the time within which the work is to be done from the date on which the notice takes effect."

Then Lord Goddard made a statement of principle on the issue of validity operating in all common law jurisdictions. It was overlooked in the celebrated case of **Strachan** which will be adverted to later. It runs thus at page 725:

> "...The sub-section does not provide for an appeal against the notice on the ground that it is a bad notice because that involves, <u>not an appeal against the notice, but a contention that the recipient never had a notice served on him at all, which is what the appellant contends in this case</u>. Quarter sessions,

> however, thought they could not entertain the point because s. 24 (1) provides that a person who is entitled to appeal against a notice under s. 23 (4) and does not do so cannot dispute, in any proceedings to recover expenses reasonably incurred by the local planning authority in doing the work of his default, the validity of the notice on any ground which could have been raised on such an appeal. Quarter sessions thought they were bound by the decision of this court in **Perrins v. Perrins,** [1951] 1 All E.R. 1075, but that case has nothing to do with this case. There the occupier of land received a notice under the Town and Country Planning Act, 1947, s. 23 (1), to cease using it as a camping site. When summoned for disobeying the notice, he contended that he ought not to have been served with it because he had always used the land as a camping site. It was held that he could not go into that question because it was an objection to the notice which could have been taken by way of appeal under s. 23 (4), and, by s. 24 (1), if it was not taken by way of appeal, it could not be raised in the proceedings. That has no application here because this point is not one in respect of which jurisdiction is given to justices on such an appeal against the notice, and, therefore, the appellant can now raise it by way of defence. The case must go back to quarter sessions with the intimation, first, that they had jurisdiction to hear the appeal, and secondly, that, in view of the decision in **Burgess v. Jarvis,** and in the opinion of this court, this enforcement notice was bad and they ought to allow the appeal." (Emphasis supplied)

The issues were again raised in **Godstone Rural District Council v. Brazil** [1953] 2 All E.R. 763 where Lord Goddard said at 765:

> "...In my opinion, therefore, this notice does not comply with the decision of the Court of Appeal in **Burgess v. Jarvis, [1952] 1 All E.R. 592,** that an enforcement notice should specify both the date when it is to take effect and the period within which the work is to be done after the notice has taken effect, and therefore, the decision of the justices on this point was right."

Parker J. said:

> "I agree. In my view, the enforcement notice sets out only one of the periods which is required to be set out by s. 23 (2) and (3) of the Act of 1947,namely, the period during which the work must be done. Counsel for the appellant council contended that it was possible to read, and that one should read, the enforcement notice as specifying the two periods. I cannot agree with that. These notices are served on members of the public who do not know, although, no doubt, they are expected to know, all the provisions of the Act, and, in my view, the notices should set out clearly (i) the period at the expiration of which the notice is to take effect, and (ii) the period after the notice takes effect during which the work is to be done. This enforcement notice does not do so."

The Tribunal erred in the instant case because it failed to construe sec. 23(2) of the Act correctly and it compounded its error by failing to follow **Burgess v. Jarvis** which is the leading case on sec. 23(2) of the Act.

Mr. Macaulay Q.C, brought to the attention of this Court the 1999 Amendment to the Town and Country Planning Act. Section 13 of the Act (the savings clause) reads:

> "13. The commencement of the Town and Country Planning (Amendment) Act, 1999, shall not affect any legal proceeding instituted before such commencement or the validity of any development order or enforcement notice in force before such commencement or any remedy in respect of any such legal proceeding to enforce or establish a right, privilege, obligation or liability acquired, accrued or incurred before such commencement and any such legal proceeding, remedy, order or notice may be continued or enforced as if that Act has not been enacted."

In particular, it was submitted that the amendment to section 23A has abolished a right of appeal to a tribunal with a further right to this Court.

It was further contended in his submissions that since the present enforcement notice is invalid, then the K.S.A.C. might be minded to commence fresh proceedings by serving a proper enforcement notice. We are not inclined to make any pronouncement on this issue. Such a pronouncement without full argument on the validity and meaning of the amendment would be out of place in these proceedings and might serve to fetter the discretion of the K.S.A.C. in the exercise of its statutory powers. In the light of the foregoing ground one of the Amended Notice of Appeal must succeed, and the enforcement notice is declared to be invalid.

There was another challenge to the validity of the enforcement notice. It was contended that it should have been signed by the Town Clerk instead of the Mayor. Ms Davis contended that it was impossible to raise such a point at this stage as it was not raised before the Tribunal.

We referred her to a number of cases which established that a jurisdictional point can be taken at any stage of the proceedings, so it could be taken before the tribunal itself after it had given its decision, and that this Court itself could take it on its own motion. These principles have been doubted recently in the majority judgments of **Leymon Strachan v The Gleaner Co. Ltd. and Dudley Stokes** S.C.C.A. 133/99 (unreported) delivered 6th April 2001. That was a case where a judge at first instance set aside the assessment of damages adjudicated on by judge and jury and also ordered a new trial, functions which are within the exclusive jurisdiction of this Court. It ought to be noted that despite the elementary principle involved, this case has been before this Court on six occasions. On the first occasion the decision

conformed with legislation and authorities binding on this Court. The majority decision delivered on 6th April, 2001 did not. Section 42 of the Judicature (Supreme Court) Act prohibits the Supreme Court from ordering new trials. The initial error was to ignore the mandatory provisions of this section. It reads:

> "42. Motions for new trials of causes or matters upon which a verdict has been found by a jury, or by a Judge without a jury, and motions in arrest of judgment, or to enter judgment *non obstante veredicto*, or to enter a verdict for plaintiff or defendant, or to enter a non-suit or to reduce damages and special cases and special verdicts, shall be heard before the Court of Appeal."

The second error arose because of the failure to grasp that an interlocutory default judgment on liability is an entitlement to proceed to an assessment of damages. The default judgment is merged on the final assessment of damages and the issue then becomes res judicata. As the rights of the parties are then finally determined the final judgment can only be challenged in this Court.

It is therefore pertinent to set out two pronouncements by the Privy Council on this issue. The first is **Chief Kwame Asante v Chief Kwame Tawia** 1949 Weekly Notes at 40 at p. 41 where Lord Simonds said:

> "...When this case reached the West African Court of Appeal it was for the first time suggested, and made a ground of appeal, that the trial court, Court B, was not validly constituted for the hearing of the case in that certain chiefs had sat as judges in that court who were not qualified to sit, and that the proceedings before that court must accordingly be regarded as coram non judice and its judgment as a nullity. On that the West African Court of Appeal observed that the additional ground of appeal was filed without the necessary leave of the court, and that it was too late in the proceedings to raise a point of that nature, which was not raised in any of the three courts below

> or at the beginning of the hearing of the appeal in that court. Their Lordships of the Board could not assent to that view. If it appeared to an appellate court that an order against which an appeal was brought had been made without jurisdiction, it could never be too late to admit and give effect to the plea that the order was a nullity."

This important statement of principle was binding on this court on every instance when **Strachan** was before it. Regrettably, it was ignored in most instances.

The other case is **Chief Kofi v. Barima Kwabena Seifa** [1958] 1 All E.R. 289, where Mr. L.M.D. De Silva delivering the ruling of the Privy Council stated at p. 299:

> "... A court had inherent power to set aside a judgment which it had delivered without jurisdiction. LORD GREENE, M.R., in **Craig v. Kanseen** ([1943] 1 All E.R. 108 at p. 113), after referring to several decisions, had said:
>
> > '...Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary.'
>
> Their Lordships were of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29 that could be made was that, a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the thing he had done. "

These principles on nullity are also stated in **Westminister Bank v Edwards** [1942] A.C. 529, **Benson v. Northern Ireland Transport Board** [1942] A.C. 320 and **Norwich Corporation v Norwich Tramways Ltd.** [1906] 2 K.B. 119. The most emphatic demonstration of this power to set aside a judgment which can properly be described as a nullity is **Pinochet**. In that case the House of Lords set aside its own judgment in **R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte No 3** [2000] 1 A.C. 147 or **Times Newspaper** 25th March 1999, on the ground that it could be argued that there was likelihood of bias since one of its members was a director of a charity which was related to one of the litigants to the dispute. The connection was not disclosed. It is open to this Court to exercise the same powers the House of Lords exercised in **Pinochet**, when there is an allegation that its own order is a nullity, because it affirmed an order which on its face is a nullity.

The appellant also relied on the Kingston and St. Andrew Corporation Act for the proposition that the enforcement notice must be signed by the Town Clerk. That section reads:

> "231.-(1) Notices, orders, accounts, demands and any other documents required to be served, given or delivered by the Council under this Act or any other enactment for the time being in force or under any by-law rule or regulation of the Council, may be in writing or print or partly in writing and partly in print; and; if the same require authentication, shall be sufficiently authenticated by the name of the Town Clerk, or any other duly authorized officer of the Council, being affixed thereto in print or in writing."

Then section 2, which contains the definitions in the above Act, defines Officer as follows:

> "officer of the Council Chamber" means the Town Clerk or any other officer or person acting within the precincts of the Council Chamber under the orders of the Mayor, and includes any constable on duty within the precincts of the Council Chamber."

It was not in dispute that the enforcement notice was signed by the Mayor, Councillor Marie Atkins, in her capacity as Chairman of the Local Planning Authority, and this satisfies the requirement of section 23(2) of the Act.

Further, Ms. Davis pointed out that section 23(2) of the Act does not require authentication and therefore Section 231 of the Kingston and St. Andrew Corporation Act does not come into play. The point raised by Mr. Macaulay on this aspect was without merit.

Ground 2

The only other ground argued reads:

> "(ii) that the Tribunal failed to consider or ignored section 2 proviso (a) of the Act which states
>
> *'the carrying out of works for the maintenance, improvement or other alteration of any building or* ***which do not materially affect the external appearance of the building;'***
>
> and therefore failed to consider the affidavit of the Respondents dated 21st December 1998 in which it is stated
>
> 'The present use by us is as a dwelling house to which we have made an extension. This extension is currently being used as a retail shop for the items which we buy wholesale from abroad or locally and retail them to our general or special customers. Not infrequently our customers require us to screen print their names and/or logos on the items. ***The extension and the dwelling area are one continuous building with a through door from one area to the next.*** In fact unlike many other

> businesses in the area we do not possess factory or industrial equipment since we are only retailers'."

Once the issue of jurisdiction was in favour of the appellant that was the end of the matter. However, as this ground was argued it is appropriate to say something on it. It was not raised before the Tribunal. The respondent had no opportunity to tender evidence in opposition, so this ground of appeal failed.

Practice and Procedure as regards appellant counsel's reply

Mr. Macaulay Q.C. attempted to reply to all the points raised by Ms. Davis for the respondent. He was stopped. The practice and procedure in this Court is that the appellant only has a right to reply to new cases cited by the respondent. This Court may ask counsel for the appellant to reply to specific points which it raises. Further, counsel may seek leave to reply on a specific point or points which may be granted. This is the practice and procedure which has guided this Court at least since 1971 when I appeared as counsel for the Crown and this practice has continued since I have been a member of the Court in 1986. No good reasons have been advanced why this flexible procedure should be altered.

We think it is appropriate to reiterate this stance in writing for the guidance of counsel, particularly, as counsel has raised it for the second time. It is fair and of great assistance in the prompt dispatch of business. The power to regulate our own procedure in the absence of statutory rules flows from the Court's inherent power as a Superior Court of Record. We use this power in the interests of justice.

Conclusion

The upshot of all the foregoing is that the appeal is allowed, the invalid enforcement notice is quashed and costs on the Resident Magistrate's Court scale is referred to the Registrar for taxation or agreement as regards the hearing before the Tribunal. Certificate for two counsel has been granted. The costs for the hearing in this Court is fixed at $180,000.00. These costs are to be paid by the respondent.

BINGHAM, J.A.

I agree.

LANGRIN, J.A.

I agree.