JUDGMENT

IN THE SUPREME COURT OF JUDICATURE
OF JAMAICA

CLAIM NO. HCV 06057 OF 2008

BETWEEN	THE KINGSTON AND ST. ANDREW CORPORATION	CLAIMANT
AND	IAN FOLKES	1ST DEFENDANT
AND	COLLETTE ALLEGRO FOLKES	2ND DEFENDANT
AND	ANDREW WILLIS	3RD DEFENDANT

IN CHAMBERS

Heard : 1st , 6th May, 10th June, 14th July, 9th and 17th September 2009, and 18th December 2009.
Miss Rose Bennett, Miss Riva Harper and Mrs. Barbara Barnaby instructed by Bennett, Beecher Bravo for the Claimant.
Mr. Philpotts-Brown instructed by Gentles and Willis for the Defendants.

PLANNING LAW-TOWN COUNTRY PLANNING ACT, SECTION23B-INJUNCTIVE RELIEF-BUILDING ACT-CONSIDERATIONS FOR GRANT OF RELIEF UNDER S.23B - WHETHER ALTERNATIVE REMEDIES UNDER ACT, OR ANY OTHER ACT MUST BE EXHAUSTED PROCEDURAL LAW - WHETHER FIXED DATE CLAIM FORM INAPPROPRIATE-WHETHER SUBSTANTIAL DISPUTE AS TO FACT

WHERE APPEAL TO MINISTER PROCEEDING WITH ONE PLANNING DECISION-WHETHER COURT SHOULD PROCEED WITH MERITS OF CASE FILED PRIOR TO DETERMINATION OF APPEAL

Mangatal J :

1. The Claimant, the Kingston and Saint Andrew Corporation " the K.S.A.C.", is a corporation established under the Kingston and Saint Andrew Corporation Act. The Claimant is the local planning authority for the purposes of the Town and Country Planning Act. 1958 "the Planning Act."
2. By virtue of the Planning Act, it is necessary for persons seeking to develop land to apply to the K.S.A.C. for permission to develop the land in the manner desired.
3. Under the Kingston and Saint Andrew Building Act 1883, "the Building Act" the K.S.A.C. is established as the Building Authority. Every person who proposes to erect any building must submit accurate plans to the K.S.A.C. showing the land or site, and must obtain the written approval of the K.S.A.C.
4. The 1st and 2nd Defendants are the registered owners of premises located at 2 and 4 University Grove, Elleston Flats, Saint Andrew, being the lands comprised in Certificates of Title registered at Volume 1102 Folio 268 and Volume 1102 Folio 267 of the Register Book of Titles "the land". The land is located at the corner of Golding Avenue and University Grove in Elleston Flats.
5. On the 29th of December 2008, the K.S.A.C. filed a Fixed Date Claim Form, which was subsequently amended to add the 3rd Defendant, claiming an injunction pursuant to section 23B of the Town and Country Planning Act against the Defendants jointly and /or severally. The basis of the claim is that the Defendants have engaged in developments on the subject premises which are being

carried out without obtaining permission from the K.S.A.C. as the Local Planning Authority and as the Building Authority.

6. The K.S.A.C.'s claim is for declarations and for injunctive relief under 23B of the Planning Act. The claim is for perpetual injunctions, both prohibitory and mandatory and the principal relief sought is as follows :

    1. *That it be declared that that the Defendants, their agents and /or servants have developed.....the land without obtaining planning permission from the Claimant.*
    2. *That it be declared that the development of the land being carried out by the Defendants their agents and/or servants is unlawful.*
    3. *That an injunction be granted immediately restraining the Defendants their agents and/or servants from carrying out any further development whether building engineering mining and/or other operations in on over or under the land.*
    4. *That an injunction be granted immediately restraining the Defendants their agents and /or servants from carrying out works for the improvement, addition, modification and/or other alteration of any building on the land which works affect the exterior of the building and/or materially affect the external appearance of the building on the land.*
    5. *That an injunction be granted immediately restraining the Defendants, their agents and/or servants from using and/or occupying the land, and/or from carrying out any activity on the land associated with the use and occupation of the land, and/or from permitting the carrying out of any activity on the land associated with the use and occupation of the land until and unless approval is sought and obtained from the Claimant and the building is certifiably safe for use and occupation.*

6. *That an injunction be granted in relation to the land immediately, mandating the Defendants their agents and /or servants to:*

    a. *pull down and/or demolish the unauthorized buildings or other operation in on over or under the land to the Claimant's satisfaction within seven(7) days from the date of such injunction.....*

    .....

7. When this matter came before me on the 22nd April 2009, with the consent of the parties, and bearing in mind the urgent nature of the case, I fixed the substantive hearing of the Claim for the 1st May 2009. I also required the parties to use their best efforts to meet by a certain date to discuss the matter and to see whether there were any amicable and cost-effective ways of resolving this case. On the 1st of May I ordered that an interim injunction which had been first granted on the 15th January 2009 in the K.S.A.C's favour, be continued until the determination of the claim. I did so without requiring any undertaking as to damages from the K.S.A.C. on the authority of **Kirkless Metropolitan Borough Council v. Wickes Building Supplies Ltd.** [1992] 3 All E.R. 717. As is quite common in relation to Planning Matters, the relevant facts have been dynamic and there have been a number of new factual developments and circumstances since the matter started. I will endeavour to summarize these matters as succinctly as possible.

8. On the 1st of May when the matter arose for substantive hearing, I took the view that one of the points being made on behalf of the Defendants was really in the nature of a preliminary point, and ought to be dealt with first. It was Mr. Philpotts-Brown's contention that these proceedings were incorrectly brought by way of Fixed Date Claim Form as they involve substantial disputes as

to fact. Reference was made to Rule 8.1(4)(d) of the Civil Procedure Rules 2002, which states:

> *8.1 (4) Form 2 (fixed date claim form) must be used-*
>
> *...(d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute as to fact.....*
>
> Mr. Philpotts-Brown submitted that the Affidavits filed by the different parties reveal and raise several issues of fact which he submitted are substantial..

My ruling was that this case is one which was not likely to involve a substantial dispute as to fact. The application is made pursuant to section 23 B. of the Planning Act and the main question is whether the Court considers it appropriate to grant an injunction for the purpose of restraining breach. Whilst there may be disputes as to fact involved in this case, in my judgment they do not constitute or affect the main question. That issue does not itself involve a substantial dispute as to fact. I therefore refused the application to strike out the Fixed Date Claim and ordered that the substantive hearing proceed. I found certain dicta in the English Court of Appeal case of **London Borough of Croydon v. Gladden and Another** (1994) 68 P.& C.R. 300 useful. In considering an application for an injunction under section 187 B of the U.K. **Town and Country Planning Act 1990**, which is in terms similar to our section 23 B where the local council had commenced the action by Writ of Summons, Lord Hobhouse at page 307 stated:

First of all, in view of the terms of section 187B, it is desirable that the procedure adopted by plaintiff councils should be one which enables the substantive application to be heard by the court at as early a date as possible.

They may wish to consider whether proceeding by way of action commenced by writ is the suitable procedure. It is liable to give rise to the

situation which we have in the present case, and the procedural complications which then ensue.

I share Lord Hobhouse's views as to the desirability of matters such as the instant case being heard at the earliest date possible. This is in the interest not just of the K.S.A.C. and the public, but also the Defendants as well.

9. In the First Affidavit of Andrene McLaren, the K.S.A.C.'s Director of Planning, filed December 29 2008, Miss McLaren states that the residents of the Golding Avenue and University Grove community have expressed their concern about developments and building operations being carried on by the Defendants on the land. The K.S.A.C. received notification of these concerns in an (undated) letter on the 5th March 2008. This letter stated that the "three-storey building.....consists of approximately thirty-two rooms(32)".

10. According to Miss McLaren, the K.S.A.C conducted a site inspection and observed that the land contains a three-storey multifamily building with a residential appearance. The building was at an advanced stage of construction. The community is characterized by mainly single storey, single family residential homes, and there are approximately four(4) two (2) storey, single family homes within the vicinity of the land. There is no other three-storey or multi-family building in the community. The rear and side boundaries of the building are erected approximately three(3) and four(4) feet from Golding Avenue and University Grove respectively.

11. Searches carried out at the office of the K.S.A.C. have revealed that no application has been made for planning permission or building approval, and that no permission has been granted by the Claimant for the development carried out by the Defendants.

12. On the 10th of March 2008, K.S.A.C. caused a Cease Work Notice to be served under the Building Act in relation to the unauthorized construction taking place on the land. The Notice instructed that work

on the building must cease as it is in contravention of the Building Act. It also notified of liability to prosecution.

13. On the 25th of March 2008, the K.S.A.C. conducted a further site inspection where it was observed that notwithstanding the service of the Cease Work Notice, construction was still in progress. Officers of the K.S.AC. visited the land on several occasions and made several attempts to secure compliance. However, the Defendants continued the unauthorized and unlawful development.

14. A Stop Notice dated 24th October 2008 was issued by the K.S.A.C. pursuant to the Planning Act and was served on the 29th October 2008. The Stop Notice required the owner/occupier/builder to

> *....IMMEDIATELY CEASE THE FOLLOWING DEVELOPMENT*
>
> ***THE CARRYING OUT OF BUILDING, ENGINEERING AND/OR OTHER OPERATIONS IN, ON, OVER OR UNDER LAND; and/or THE CARRYING OUT OF WORKS FOR THE MAINTENANCE, IMPROVEMENT, AND/OR OTHER ALTERATION OF A BUILDING WHICH WORKS AFFECT THE EXTERIOR OF THE BUILDING AND/OR MATERIALLY AFFECT THE EXTERNAL APPEARANCE OF THE BUILDING***
>
> *Which development is unauthorized or is hazardous or otherwise dangerous to the public and which is being carried out in breach of a condition subject to which planning permission was granted, or which is being carried out without the grant of planning permission.*

15. The Stop Notice was ignored and upon further inspection by the K.S.A.C. and an inspection carried out on the 11th December 2008, it was observed that the unauthorized construction work was still in progress.

16. Notwithstanding the several attempts by the K.S.A.C. to secure the Defendants' compliance with the Planning Act and other relevant laws,

the Defendants continued to build in contravention and defiance of the law.

17. Miss McLaren, at paragraph 24, states that she visited the premises on the 19th of December 2008 and confirmed a number of matters, including the following:

(i) *That there are thirty (30) studio units contained on three (3) floors,*

(ii) *That there are ten (10) units on each floor,*

(iii) *That each unit has its own entrance from the passage/walkway which runs the length of the front of the building*

(iv) *That there are no connecting doors between units,*

(v) *Each unit has a small bathroom and a kitchenette,*

(vi) *That the bedrooms and bathrooms are too small.*

...

(vii) *That there are several factors evidencing poor construction of the building, one such factor being the uneven floors in the corridor.....*

(viii) *That the minimum height of a stairway opening is six(6) feet while the minimum width of a stairway is three(3) feet. That the rise and run of the stairs should be even throughout. That the staircase for the building is very narrow being approximately two(2) feet wide instead of the required minimum width of three(3) feet. That this prevents persons from being able to go up or down the stairs while others are using the said staircase.*

(ix) *That the stairs leading up to the second floor are steeper than the stairs leading to the ground*

floor, being further evidence of poor construction of the building.

(x) *That there are no emergency exits on the building and this is a breach of the fire codes and a serious safety hazard.*

(xi) *That the only opening /doorway to the rear of the building is on the ground floor in the washroom. This opening/doorway is ineffective as an emergency exit due to the proximity of the building to the boundary.*

(xii) *That the building is in breach of setback requirements and is constructed too close to the boundaries. .....*

(xiii) *That there is insufficient parking on the land. That as there are thirty (30) units on the building, there should be a minimum of thirty (30) parking bays including parking bays for the disabled. ..... additional provision is to be made for visitor's parking. The only area that could possibly be used on the land for parking is to the front of the building which appears to be able to accommodate no more than six (6) parked vehicles.*

(xiv) *That the area is zoned for thirty (30) habitable rooms per acre. The land is less than an acre and lacks a proper amenity area, that is areas such as a drying yard and common open area for persons to use for recreational purposes. .....*

(xv) *That there is no evidence of common open space being provided on the land.*

(xvi) There are no sewer lines in the area and as a result, sewage disposal treatment facility is required to be provided on the land.

(xvii) That there is no evidence that provisions are made to intercept and dispose safely of surface/storm water drainage.....

18. Ms McLaren states that the K.S.A.C formed the view that the Defendants will continue to wantonly and deliberately ignore the law, or attempt to circumvent the law by actually using and occupying the building, (or attempt to use and occupy the building) or permit the use and occupation of the building, without first seeking and obtaining approval.

19. The K.S.A.C. is concerned that should the Defendants attempt or commence (or permit) the use and occupation of the premises before plans are submitted and approved and all conditions complied with, the Defendants may be jeopardizing and compromising the safety of the prospective owners, occupiers, tenants, workers, visitors, and any persons who may visit and/or use the premises. This is because there has been no prior opportunity given to the K.S.A.C. and other relevant authorities to assess, ascertain and ensure that the building is in fact erected in a manner that is safe for human use and occupation.

20. Miss McLaren states that prior to filing this claim, the K.S.A.C. considered the hardship of the Defendants, particularly the financial costs associated with the existing construction, and the time and effort put into the entire project. They considered the fact that there are possibly prospective purchasers or tenants who are waiting to use and occupy the building, and the associated lost potential revenue from rental income.

21. However, the K.S.A.C. also had to consider the negative impact of the building and development on the land, such as:-

a. the physical danger to life and limb associated with the use of a building that may not have been built in accordance with the required safety standards;
b. the potential loss of life limb and property (including adjoining property/roadway) should the structural integrity of the building be so impaired that the building collapses;
c. the safety hazards and physical danger to life, limb and property associated with the breaches of fire safety measures;
d. the potential danger to adjoining lands, and occupiers and users of adjoining lands (including public roads and the pedestrians and motorists);
e. the lack of sufficient parking;
f. the increased traffic on Golding Avenue as well as University Grove;
g. the change in the aesthetic character of the community from residential single family to residential multi-family or motel or hotel or other use;
h. the loss of privacy to adjoining property owners and/or occupiers due to the proximity of the building to the boundaries.

22. The K.S.A.C. Miss McLaren states also had to consider that the lands are zoned for residential use and the negative impact on the land and adjoining lands as well as on surrounding land, owners, occupiers and other users.

23. The K.S.A.C. on 14th January 2009 filed an Affidavit by one Sabita Maharaj. Miss Maharaj states that she had been seeking accommodation near to the University of the West Indies Campus, Mona for her cousin who was beginning a course at the University in January. Miss Maharaj exhibits to her Affidavit a copy of a newspaper advertisement in the

Classified Advertisements section of the Sunday Gleaner issue of January 11 2009. This advertisement offered accommodation to students at the land and she speaks of a conversation that she had with the 2nd Defendant in which it was indicated that the rooms would be fit for habitation by the 26th January 2009.

24. An Affidavit was filed on behalf of Mr. Norman Shand, the City Engineer to the K.S.A.C. Mr. Shand depones that on the 12th January 2009 he carried out a site visit to the Land. In his Report which was issued to the Town Clerk, Mr. Errol Greene, Mr. Shand concluded (page 2 of the Report) as follows:

> *Conclusion*
>
> *The development is currently incomplete and unoccupied.*
>
> *Work is presently being undertaken such as masonry, electrical, plumbing and tiling. Fire safety measures are not installed to meet the Fire Safety Regulations. The setbacks are inadequate and the stairs risers and treads are inconsistent and do not meet the standard requirement.*

25. On the 6th of January 2009 the First Affidavit of Andrew Willis was filed. At that time Mr. Willis had not yet been joined as the 3rd Defendant. In it the 3rd Defendant states that he is the Attorney-at-Law for the 1st and 2nd Defendants and he is the major investor in the development taking place on the Land. He states that the 1st and 2nd Defendants brought him on board to continue the development in the capacity of investor as they were unable to complete it themselves. The funding for the investment came mostly from loan proceeds borrowed from financial institutions. He joined in the development although initially he had had reservations.

26. According to the 3rd Defendant, certain aspects of Miss McLaren 's Affidavit evidence and relief being sought by the K.S.A.C. are misleading as he claims that the construction on the premises is complete and he exhibits photographs in furtherance of this assertion.

He also claimed that the premises are already occupied and that contracts for tenancy are already in place. Additionally, he claims that the K.S.A.C has not properly identified the boundaries of the Land.

27. The 3rd Defendant maintains that to grant the relief sought may result in criminals and other undesirables occupying the premises, thereby endangering the occupants of premises in the immediate surroundings. He claims that there are 2 inner city areas not far from the development and he asserts that it is highly likely that persons from those areas would use the site as a hideout.

28. The 3rd Defendant disagrees that no prior opportunity was given to the K.S.A.C. or other relevant authorities to assess and ensure the building's safety. He claims that a plan for the construction of a two storey building was submitted to and approved by the Fire Department, which the 3rd Defendant claims, "confirms that the building based on the land was erected in a manner safe for human use and occupation". According to the 3rd Defendant, on receipt of this approval, which the 3rd Defendant exhibits, discussions were had in relation to the addition of a 3rd storey and certain other changes to make the students more comfortable. The draftsman did not deliver on his promise to provide the Defendants with his revised drawings and that led to the delay in submitting the application to the K.S.A.C's office.

29. At paragraph 14 of the 3rd Defendant's Affidavit, a very important admission is made. Amongst other matters, it is stated:

> .....*Further, although no official application was made to the Claimant's office a copy of the plan submitted to the Fire Department was in fact submitted to the Claimant. Upon my visit to the Claimant's office with the application I was advised by 2 officers of the Claimant, one Mr. Bennett and one Mr. Calvert Sutherland, Assistant Building Surveyor that I should not submit the application I had in hand as they were*

already in possession of the plan and they would conduct a search to locate the same. The search did not locate the said plan up to the time of leaving the Claimant's office.

30. Amongst the grounds that the 3rd Defendant advances as to why the Court should not make the orders sought by the K.S.A.C. are the following:

a. It would put an end to the dream to assist hundreds of students who are seeking scarce and affordable accommodation while they attend university and also endanger the lives of people residing not just on the adjoining premises but in the wider community.
b. To grant the injunction would be an exercise in futility as this would prevent the honouring of Tenancy Agreements in place and persons now in occupation would be unjustly prejudiced.
c. The University has approached him with an interest in taking and managing the entire building as soon as it becomes available.

31. On the 11th of February 2009 the 1st Defendant filed an Affidavit in which he indicates that sometime in 2006 he authorized his wife, who is the 2nd Defendant, to deal with the lands and all transactions pertaining to it.

32. On the 13th January 2009 an Affidavit was filed on behalf of the 2nd Defendant. She describes in her evidence the dream she and her husband the 1st Defendant had had to provide reasonable affordable accommodation to students of the University of the West Indies. She traces the background, reasons and history as to how she and the 1st

Defendant came to acquire the lands. The 3rd Defendant in his 1st Affidavit also indicated a similar vision and aspirations. The 2nd Defendant confirms that the 3rd Defendant after much persuasion decided to become an investor and that it was agreed that profit sharing would be decided when the project was complete and would be done on the basis of capital injections made.

33. The 2nd Defendant in paragraph 13 of her Affidavit seeks to deal extensively with the criticisms and problems associated with the lands and development identified by the K.S.A.C. and set out in paragraph 24 of Miss Mc Claren's Affidavit. At paragraph 14 of her Affidavit, the 2nd Defendant states :

> 14.....*All contraventions of the law in accordance with approved standard, policies, codes, if any, will be adjusted accordingly and will therefore not present any safety hazards and endangerment of life limb and property.*

34. The 2nd Defendant further states that the building has been certified as safe for occupancy according to a structural engineer's report and that report is exhibited.

35. In paragraph 15 of her Affidavit, the 2nd Defendant reveals what I can only describe as a most interesting approach to the Stop Order issued by the Claimant, the duly constituted authority:

> *15. That paragraph 26 and 27 of the* (McClaren) .... *Affidavit is incorrect as the attempts made by the Claimant started when the building was near its completion. One neighbouring community is August Town. This still remains an area of sporadic violence* (which) *the government has still not been able to control. This community lies within a two mile range from the building. As a result, a decision had to be made given the volatile nature of the community, as to what would be better in the interest of the community. If we obeyed the Claimant's stop order and leave an unfinished building in a*

vicinity where there is ongoing war between gangs, the building would be a target for their occupancy, thus providing for them a haven where they could occupy and from which they could more easily terrorise the community. Alternatively, we could quickly complete the building so that there would be no access to the building by these undesirables, thus not creating new opportunities for these terrorists and in so doing, enter into continued discussions with the Claimant to regularize the facilities, pay required fines and thus act as an agent of positive change in the community and also in the lives of many Jamaicans. We chose to take the directives of the more productive route and the one of greater good.

It seems to me that what the 2nd Defendant is stating here is that the Defendants decided to rush and complete the building notwithstanding that they had been served with a Stop Notice by the K.S.A.C.

36. Much of what is contained in these Affidavits by the 2nd and 3rd Defendants is also set out in the Defence filed on behalf of the 1st and 2nd Defendants on the 11th February 2009.

37. As indicated earlier in this judgment, the situation and circumstances in this case have been quite fluid. In her third Affidavit, Miss McLaren indicates that on the 13th of January 2009, the Defendants made an application to the K.S.A.C. for detailed building approval for a new building on the land. That application was to obtain approval to construct a three (3) storey multi-family residential building consisting of 12 apartment units totalling 810 metres squared on 710 metres squared of land. The proposal consists of 4 bedrooms, 4 living rooms, a laundry room and an office on each floor along with a kitchen, bathroom, study and closet. A copy of the application is exhibited. Miss Mc Laren also indicates that on the 23rd of January 2009 a report was received

by the K.S.A.C. from the Jamaica Fire Brigade dated 15TH January 2009, identifying various Fire Safety breaches posed by the building on the Lands, in contravention of the National Building Code. In that letter, under the signature of Mr. Floyd McLean, the Senior Deputy Superintendent for Chief Fire Prevention Officer, indicated that a check with the Plan Review section of the Jamaica Fire Brigade revealed that no building plans were submitted for approval. In the penultimate paragraph, the letter states:

> *Thus, the inspection revealed that this premises is constructed in contravention to good fire safety standard. It is therefore the recommendation of the Jamaica Fire Brigade that the breaches noted be corrected before the building is allowed occupancy.*

38. The Council's Building and Town Planning Committee refused the application for planning and building permission submitted by the Defendants. This refusal was communicated by a letter dated 19th March 2009 addressed to the 1st Defendant in care of the stated applicant Donald McKenzie. The letter is exhibited and indicates that the Application was refused upon the following grounds:

a. *The planning application submitted ...is a complete misrepresentation of the actual development currently existing at the site....The submission bears little or no relevance to the existing situation.*
b. *The structure is inadequately setback from all the property boundaries. Additionally, the distances indicated on plan are misrepresentation of the actual setback distances.*
c. *The area of the plot of land is inadequate for this development. A development of this nature was not contemplated for the site.*
d. *The development is over-intensive, as a result, adequate provision is not made for the following:*

a) Parking: *Adequate parking and maneuvering space is not available on site.*

b) Amenity Space: *No space is available for the recreational needs of the development.*

c)Sewage Disposal *Tertiary treatment of sewage is required for this area. The proposal for septic tank and absorption pit is unacceptable.*

e. The bathrooms and kitchen areas are below the minimum required standards which are 2.75m2 and 3.75 m2 respectively.

f. The height of the structure exceeds the permissible building height for the area.

The letter then closes by reminding the Applicants that they have a right of appeal to the Office of the Prime Minister, Local Government Department within 30 days of receipt of the letter, if aggrieved.

39. An Affidavit of Donald McKenzie, Architect, was filed on behalf of the Defendants on the 28th April 2009. Mr. McKenzie states, that he visited the Lands on about three (3) occasions to take and verify the necessary measurements. He verily believes that the measurement of the studios as stated at paragraph 7 of the Affidavit of Norman Shand are within the requirements of acceptable building standards.

40. In the 3rd Defendant's Affidavit, filed April 28 2009, at paragraph 10, the 3rd Defendant states that for the Defendants to restore the land as required by the K.S.A.C. would necessarily mean a total demolition of the premises. This would mean a loss of an approximate value of $130 Million, separate and apart from the bank interest that would have to be accounted for. At paragraph 19 the 3rd Defendant states that the mortgagor, (I think he must mean mortgagee) from which funds were obtained and used in the development have made

demand for outstanding payments totalling approximately $4 million in arrears. The mortgagee has instituted auction proceedings against both properties.

41. On the 1st May 2009, Counsel for the K.S.AC. Miss Bennett indicated that although the parties had met, having looked at the matter in detail and carefully, the K.S.A.C, has found itself unable to take a different approach to this matter.

42.In his 4th Affidavit filed 5th May 2009, the 3rd Defendant takes issue with Miss Bennett's statement and claims that he had reason to believe that the matter could still be discussed and worked on. He referred to a letter dated April 27 2009, which he wrote to the Mayor of the K.S.A.C., His Worship Mr. Desmond McKenzie. To that Affidavit, by permission the 3rd Defendant exhibited certain documents upon which the Defendants wished to rely but which had not been put before the Court properly. He exhibited a copy of what he claimed was the Fire Department's Approval certain general Conditions of Approval for property in the area, and copies of the 2006 application to the K.S.A.C. and of cheque evidencing payment of the relevant fees. He also exhibited what he referred to as "electrical inspection reports for the building, indicating that the Inspection Department of the Jamaica Public Service Co. Ltd. passed the building as fit for the company to install meters.

43.In response to the 3rd Defendant's 4th Affidavit, Miss McLaren reiterates that no settlement could be reached. She points out that in any event, one of the proposals which the 3rd Defendant makes for providing solutions is that the K.S.A.C. should waive the requirements for amenities and parking and also the setback requirement. The K.S.A.C. could not properly waive either.

44.In her 5th Affidavit, Ms. Mc Laren indicates that the National Works Agency has recommended refusal of the application by the Defendants to retain the structure on the Lands. The letter dated 20th

May 2009 is addressed to the K.S.A.C.'s Town Clerk, and speaks to setback breaches, over intensive development, inadequate parking spaces, lack of provision for drainage/storm water runoff, and the hazardous effects for on street parking and flow of traffic.

45.By a letter dated May 22 2009, addressed to the K.S.A.C.'s City Engineer, the National Water Commission indicated that their records show that no application for sewage connection in relation to the Lands has been received by the N.W.C. In addition, the letter indicates that the complex is illegally connected to the NWC's central sewage system.

46. In her 6th Affidavit filed June 23 2009, Miss McLaren exhibited a letter dated 29th May 2009 addressed to the K.S.A.C.'s City Engineer from the Commissioner of Mines of the Ministry of Mining and Telecommunications. In that letter it was stated that the Mines and Geology Division has no objection in principle to the development on the Lands. However, the letter stated:

> *...We however, note that the development is an existing one and setback of the building from the site boundary has been breached.*

47. Miss McLaren exhibited a letter dated 9th June 2009 to the K.S.A.C.'s Town Clerk from the National Environment & Planning Agency " NEPA" in which NEPA also recommended refusal of the application by the Defendants for retention of the building on the Lands because of setback breaches, over-intensive development, parking bay problems and inadequate provision for water run off.

48.Miss McLaren filed a 7th Affidavit on the 10th July 2009. In that Affidavit she indicated that by letter dated June 18, 2009, addressed to the 1st and 2nd Defendants from the K.S.A.C.'s Town Clerk, the Defendants were formally refused planning and building permission for retention of the existing structure. The letter states:

I am directed to inform you that the Council's Building and Town Planning Committee, at its meeting on June 17, 2009, refused planning and building permission for retention of structure comprising thirty (30) apartments each consisting of kitchenette and bathroom at the above address in accordance with plans submitted(Date stamped May 4, 2009) for the following reasons:

a) The development is over-intensive therefore the amenity space provided is inadequate for the enjoyment of the occupants.

b) The space to accommodate the requisite number of parking bays as well to facilitate the safe and free movement of vehicles within the cartilage of the site is inadequate.

c) The setbacks are inadequate at all boundaries.

d) There is no provision for the safe interception and disposal of surface drainage/storm water run off within the site.

e) The location of the building violates the 6.1m set back required from the boundary along Golding Avenue and University Grove respectively.

f) The proposal represents an over intensive development of the site without adequate space to provide the number of parking spaces required to satisfy the activity.

g) The minimum parking spaces 2.44m x 5.48 m in size with a 6.1m wide driveway for maneuvering required to support this development cannot be provided within the site.

h) The development, if recommended would result in on street parking which would prove hazardous to road users and detrimental to the free flow of vehicular traffic.

i) Structural drawings do not meet the required standards of the industry.

49.Then on the 13th July 2009, the 3rd Defendant filed his 5th

Affidavit, in response to the 5th and 6th Affidavits of Miss McLaren. He states that the sewage line connection was completed many months before the K.S.A.C.'s Claim was filed, based upon incorrect advice from the then contractor and misunderstanding by the 3rd Defendant of the conditions of approval dated November 1, 1972. He states that a formal application has now been made to the N.W.C.

*50.*The 3rd Defendant informs that, in keeping with his right of Appeal under Sections 13 and 15 of the Planning Act, by letter dated June 26, 2009, he has applied to the responsible Minister to reconsider the K.S.A.C.'s refusal of the Application for the Retention of the Building.

*51.*The 3rd Defendant states that subsequent to one of the Court hearings, and his receipt of the letter of refusal from the K.S.A.C., he has been successful in acquiring a lot of land that he believes will suffice in satisfying the overriding concerns that were raised as the basis for refusal. The 3rd Defendant submits that the Lot, which is neighbouring/ close to the development, is more than ¼ acre but less than ½ acre, and should adequately deal with the issues of over density and parking facilities.

The K.S.A.C.'s Submissions

52. The Defendants have now applied for approval twice since the filing of this Claim, and both applications have been refused. Miss Bennett wisely submitted that, to the extent that the grounds of refusal identified certain critical breaches, one could focus on the grounds of refusal somewhat more than the observations made earlier on site visits.

53. She indicated that whilst some of the problems identified can be corrected, there are a number of matters that the K.S.A.C.consider critical problems. Examples are items 19 (xiv), (xv), (xvi), (xvii), and (xix), of the K.S.A.C.'s written submissions and which are all included

in the refusal letter and indicate why the development cannot be allowed to remain. These are:

> *(xiv) That the building is in breach of setback requirements and is constructed too close to the boundaries. The setback should be a minimum of 5 feet per floor, hence the 1st floor should be a minimum of 10 feet, and the 2nd floor a minimum of 15 feet.*
>
> *(xv) That there is insufficient parking space on the land ....*
>
> *(xvi) That the area is zoned for 30 habitable rooms per acre. The land is less than an acre and lacks a proper amenity area, that is areas such as a drying yard and common area for persons to use for recreational purposes. ...*
>
> *(xvii) That there is no evidence of common open space being provided on the land.*
>
> *(xix) That there is no evidence that provisions are made to intercept and dispose safely of surface/storm water drainage.*
>
> As to this latter point, Miss Bennett indicates that almost the entire ground is covered in concrete, in an area prone to flooding. In so far as it has already been built in this way, this problem, as well as the insufficient setback issue cannot readily be cured.

54. The K.S.A.C. continues to have a concern about safety issues in relation to the building. It is not the K.S.A.C. alone, but other relevant authorities have also had no prior opportunity to assess and ensure that the building is safe for human use and occupation. The point is made that one of the reasons that the Law requires applications to be made before development or building get underway is so that the K.S.A.C and other relevant authorities can remain involved in the process.

55. Miss Bennett points out that the K.S.A.C. not only had regard to the nature of the breaches, but also looked at all the

circumstances and at what hardships would be suffered by the Defendants in the event that the relief sought is granted. The K.S.A.C. took all of these factors into account before coming to its decision to bring this action. She submits that all of the concerns have been borne out when one looks at the concerns of all the other authorities which were raised when the application was circulated.

Miss Bennett relied upon paragraphs 31and 32 of the decision in **Wrexham County Borough Council v. Berry, South Bucks District Council v. Porter** [2003] UKHL 26, " The South Bucks case". Lord Bingham stated at parargraph 31:

31. In Westminster City Council v. Great Portland Estates plc[1985] A.C.661, 670 Lord Scarman drew attention to the relevance of planning decisions , on occasion, of personal considerations:

"Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. .....

When application is made to the court under section 187B, the evidence will usually make clear whether, and to what extent, the local planning authority has taken account of the personal circumstances of the defendant and any hardship an injunction may cause. If it appears that these aspects have been neglected and on examination they weigh against the grant of relief, the court will be readier to refuse it. If it appears that the local planning authority has fully considered them and nonetheless resolved that it is necessary or expedient to seek relief, this will ordinarily weigh heavily in favour of granting relief, since the court must accord

respect to the balance which the local planning authority has struck between between public and private interests. It is, however ultimately for the court to decide whether the remedy sought is just and proportionate in all the circumstances.....

56.Miss Bennett, in responding to a question from me as to whether the Court ought to proceed in light of the fact that the Defendants are still exploring the option of Appeal to the Minister, referred to the case of **Official Custodian for Charities v. Mackey** [1985] 1 Ch. 168. She relies on this decision in support of her submission that this court can still hand down a decision and the matter can proceed on its merits as presented to the Court, notwithstanding that the Defendants have other rights or options to pursue. Having considered the point, including a perusal of the authority cited and others which I shall refer to later in this Judgment, I agree that the Court can consider whether or not to grant injunctive relief, notwithstanding that the Defendants may be in the throes of pursuing their right of appeal to the Minister.

57. Miss Bennett submits that the Court's power to grant an injunction under section 23B of the Planning Act is a discretionary power and the K.S.A.C. rely on the House of Lords decision in the **Southbucks** case, with the caveat that Article 8 of the European Convention on Human Rights is inapplicable to this case. Lord Bingham of Cornhill in delivering judgment at paragraph 29 stated:

> *The discretion of the court under section 187B, 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 restrain 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. Since the facts of different cases are indefinitely various, no single test can be prescribed to distinguish cases in which the court's*

discretion should be exercised in favour of granting an injunction from those in which it should not. 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 (City of London Corporation v. Bovis Corporation Ltd. [1992] 3 All E.R. 697, 714) that will point strongly towards the grant of injunction. So will a history of unsuccessful enforcement and persistent non-compliance, as will evidence that the defendant has played the system by willfully exploiting every opportunity for prevarication and delay, although section 187 B(1) (identical to section 23B of the Jamaican Act) *makes plain that a local planning authority, in applying for an injunction, need not to have exercised nor propose to exercise any of its other enforcement powers under Part VII of the Act. In cases such as these the task of the court may be relatively straight-forward. But in all cases the court must decide whether in all the circumstances it is just to grant relief sought against the particular defendant.*

58.Paragraphs 63, 64, 71 and 73 are also instructive. Lord Bingham stated at paragraphs 63 and 64:

63.It may be noted at the outset that the section is talking about an injunction. This is not a new remedy created by Parliament but a familiar and long established form of remedy in English law. What the section did was to give an express statutory power for local planning authorities to apply to the court for that remedy and a discretion in the court to grant it. The power was given expressly to local planning authorities, so that this remedy may not be sought under the statute by anyone else. Parliament imposed an express pre-condition for the application upon the authority, namely that it must consider it necessary or expedient for an actual or apprehended breach of

planning control to be restrained by injunction. That initial step of consideration is one which they must have taken before they can make the application and it serves as an initial restraint on the power to make the application under the Act. It does not seem to me to bear upon the problem of the scope of the court's discretion. ...

64. Subsection (1) may be seen as widening the availability of the power to apply in providing that the application may be made whether or not the authority have exercised or are proposing to exercise any of the other powers in Part VII of the Act. That includes in particular the power to issue a planning contravention notice under section 171C, an enforcement notice under section 172, a breach of condition notice under section 187A, and a stop notice under section 183. But that does not mean that the court may not take account of the facts regarding any other remedy which the authority have pursued or the fact that they have not pursued any other remedy. ....

...

The Defendants' Submissions

59. **STOP NOTICE AND ENFORCEMENT NOTICE** By way of certain amended written submissions dated April 29 2009, Mr. Philpotts-Brown argued the following points, noted as "M". and "N".

> *M....the Claimant failed to provide any evidence that it is compliant with Section 22A (4) of the Town & Country Planning Act, which requires that the stop notice states the name of the person to whom directed, nature of development and effective period of the notice. The alleged stop order notice as exhibited...., fails to properly comply with the requirements of Section 22A, and as such, is an ineffective notice. Further, the Claimant failed to prove that it complied with Section 22A(5)(a)(b), in that, no stop notice was posted in a conspicuous place, either on the premises, at a court house,*

police station or other public place as required under this Section.

N....the Respondent received no enforcement notice as required under Section 23 (1A),.... The requirement for an enforcement order under Section 23 aforesaid, ought to, from necessity be issued before an Application for Court Order. To that extent, the Defendants were not allowed proper opportunity to resolve the matter before it was brought before the Court.

60. Mr. Philpotts-Brown referred to the Court of Appeal's decision in Civil Appeal No. 33 of 2004 **Best Buds Ltd. v. The Ministry of Land and Environment , the A.G. and the K.S.A.C.**, judgment delivered December 14, 2007. He relied upon that decision to say that the provisions in sections 22A and 23 of the Planning Act are mandatory.

61.**OTHER REMEDIES INADEQUATE** It was also argued that the equitable relief of an injunction is only available where the Claimant establishes that other legal avenues are inadequate or closed and this is not the case here, as the Claimant could use the provisions of the Building Act, in particular reference was made to Section 10.

62.Mr. Philpotts-Brown argued that the Claimant must establish that the remedy of damages is not adequate and since it has not done so, it is not entitled to the relief of an injunction. Reference was made to **London & Blackwell Ry v. Cross** (1886) 31 Ch. D. 354.

63.It was submitted that equitable principles have to be taken into account and that "he who seeks equity must do equity", and that "he who comes to equity must come with clean hands." It was submitted that the Court of Appeal in the **Best Buds** case construed the section 23 as being mandatory. Sections 22A and 23 are mandatory, Mr. Philpotts-Brown continued, whereas section 23 B is permissive. He submitted that the K.S.A.C. should carry out the legislative intent. In the same way that the K.S.A.C. pray in aid the equitable jurisdiction

of the court because they say that the Defendants should not be allowed to act in breach of the Planning Act, by the same measure, the K.S.A.C. should behave equitably and comply with the provisions of the Planning Act. He submitted that by not following the procedure of issuing and serving an Enforcement Notice after issuing a Stop Notice, the K.S.A.C. have wrongfully deprived the Defendants of an opportunity to resolve the matter before it was brought to court. He submitted for example, that had the K.S.A.C. sought to enforce criminal proceedings for breach of the Notices, if faced with criminal sanctions, it may well be that the Defendants would have stopped their activities carried out in breach.

64. He also relied upon passages from the Judgment of Lord Bingham in the **Southbucks** case, in particular paragraphs 18, 27 and 28. Mr. Philpotts-Brown relied on these passages from the **South Bucks** case he asked the Court to weigh the matter, taking into account the severe shortage of living accommodation in the relevant area, the loss of jobs, and the grave and far-reaching financial hardships which will be occasioned to the Defendants if the injunctive relief sought is granted. Lord Bingham at paragraphs 27 and 28 stated:

> *Section 187B*
>
> *27. The jurisdiction of the court under section 187B is an original, not a supervisory, jurisdiction ...*
>
> *28. The court's power to grant an injunction under section 187B is a discretionary power. .... Underpinning the court's jurisdiction to grant an injunction is section 37(1) of the Supreme Court Act 1981, conferring power to do so "in all cases in which it appears to the court to be just and convenient to do so". Thus the court is not obliged to grant an injunction because a local authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction and so makes application to the court. .....*

65. Reliance was placed by the Defendants on **Stoke-on-Trent v. B.& Q Retail Ltd.** [1984] 2 All E.R. 332, **Stafford Borough Council v. Elkenford Ltd.** [1977] 2 All E.R. 519, and **Vale of White Horse District Council v. Allen & Partners** [1997] Env. L.R. 212.

66. In **Stoke-on-Trent** , a local authority sought an injunction in civil proceedings as a means of preventing a breach of the criminal law. The House of Lords (see the headnote) held that :

> *The authority had to show not merely that the offender was infringing the law but that he was deliberately and flagrantly flouting it, since breach of the injunction might lead to more onerous penalties being imposed for the criminal offence, and therefore the Court would exercise its jurisdiction to grant an injunction with caution....*
>
> *.... As a general rule a local authority should try the effect of criminal proceedings before seeking the assistance of the civil courts.*

To a similar effect is our Court of Appeal's decision in **K.S.A.C. v. Auburn Court & Perrier** (1988) 25 J.L.R., 145.

67. In the **Stafford Borough** case, a company held a market each Sunday in contravention of the Shops Act 1950 and in breach of the Town and Country Planning Act 1970. The English Court of Appeal held that:

> *....the High Court had a reserve power to enforce the statute, by injunction or declaration, even though the authority responsible for enforcing the statute had not exhausted the possibility of restraining the breaches....it was a proper exercise of the court's discretion to grant the injunction in view of the fact that otherwise the company would continue, deliberately and flagrantly, to flout the 1950 Act.*

Wednesbury unreasonable.

THE LAW

*68.*Section 22A of the Planning Act deals with Stop Notices and Section 23 addresses Enforcement Notices. Section 10 of the Building Act is concerned with the procedure to be adopted by persons proposing to erect or re-erect buildings.

*69.*Section 23B is the section under which the K.S.A.C. make the present application. It provides:

> *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,*
>
> *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.*
>
> *(2) On an application under subsection (1), the court may grant such injunction as the court thinks appropriate for the purpose of restraining the breach. ...*

RESOLUTION OF THE ISSUES

70. It is clear that the Defendants have now made two applications to the K.S.A.C., one on January 13 2009, for detailed approval for a new building on the land, and one dealt with by the K.S.A.C. in May-June 2009, seeking planning and building approval for the retention of the existing structure on the land. Whereas in the application submitted in January, the Defendants referred to 12 Apartment Units, and this was described as a complete misrepresentation of the actual development on

site in the K.S.A.C.'s first letter of refusal dated March 19,2009, in their later application, the Defendants admit that in fact what is involved are 30 units. It therefore seems that no serious issue is being taken with the K.S.A.C.'s position that prior to the filing of this Claim for an Injunction, there was no application for approval, of the type and nature of the structure which the Defendants erected and which is in existence on site. However, for completeness, and also as a part of my analysis of the circumstances and how best to exercise my discretion, I will look at a number of assertions which the Defendants made.

71.The Defendants claimed that although no official application had been made to the K.S.A.C., a copy of the Plans had been submitted to the Fire Department and that that Department had approved them. However, the proof which the Defendants rely on i.e. the exhibit marked "B", attached to the 4th Affidavit of Andrew Willis proves nothing of the sort. What is exhibited there is merely part of a plan that has no marks whatsoever to associate it with plans for the instant development or building, and the Fire Department has denied receiving submission of any building plans for approval. In any event, the 3rd Defendant claimed that plans for construction of a 2 storey building were submitted and approved and the actual building on the ground is a 3 storey structure. Further, it is plain that, although the Fire Department' s input is critical, the Law requires that the applications for approval be submitted to the K.S.A.C. as local planning authority in respect of the development , and to the K.S.A.C. as the Building Authority in respect of the building.

72.The Defendants also claimed that a copy of the plan which was submitted to the Fire Department was also submitted to the K.S.A.C. The 3rd Defendant claimed that on his visit to the K.S.A.C.'s office with the application he was advised by 2 officers of the K.S.A.C., Mr. Bennett and Mr. Calvert Sutherland, Assistant Building Surveyor that he should not submit the application that he had in hand because they were already in possession of a copy of the plan and that they would conduct a search to

locate it. However, Miss McLaren stated that those 2 officers have advised her that no such application ever existed. The Judicial Committee of the Privy Council's decision in P.C.Appeal No. 76 of 2002, **Auburn Court v. K.S.A.C. et al**, delivered 23rd February 2004, upholding the majority decision of the Jamaican Court of Appeal, in particular paragraphs 6 and 21, is authority for the proposition that, absentevidence that these 2 officers were authorized to say that no application needed to be made, it would not be the function of either of these two officers to take decisions which are to be taken by the Council in the terms of the relevant Statutes. The power of decision on these matters resides in the Council of the K.S.A.C., which consists of the Mayor and his Councillors.

73.The Defendants also sought to rely upon certain conditions of Approval dated November 1st , 1972, in particular condition (n). These conditions are exhibited as Exhibit "H" to the 4th Affidavit of the 3rd defendant. Condition (n) reads:

(n) That the developers shall at their own cost and in accordance with the plans, specifications and estimates approved by the Water Commission on 9/10/72 carry out the necessary works for linking the sewer system in the subdivision to the sewerage disposal system in Elletson Flats.

They relied upon this condition to say that this gave them the right and approval to link themselves directly to the NWC system. However, these are conditions of approval relevant to the entire area. Item (n) refers to "developers", and means those persons or the entity that submitted the application for sub-division approval. It did not enure to the benefit of individual Lot owners. Clearly, if the Defendants had desired to make arrangement for a proper sewage system for the development planned by them, they would obviously have to communication with the NWC.

74. I agree with Miss Bennett that the 2 applications for approval made by the Defendants, is tacit admission that at the time of erection and construction they had no approval and nor did they have such approval

at the time when this Claim was filed by the K.S.A.C. This is not a case where the Court will have to examine the circumstances to see whether there was in fact a breach of the relevant Statutes. It is not a case where the matter is a question of fact and degree; it is a clear-cut case where the Defendants are in breach of the Planning Act and the Building Act. These circumstances of clear breach are factors which I will have to place in the milieu in considering whether it would be just to grant the injunctive relief.

75. I now turn to deal with the Defendants' arguments about the Stop Notice. There is no denial by the Defendants that they in fact received the Cease Work Notice and the Stop Notice. Indeed, at paragraph 15 of her Affidavit filed on the 13th January 2009, the 2nd Defendant clearly admits receipt of the Stop Notice, and even sought to advance reasons and justifications as to why the Defendants did not obey the K.S.A.C.'s Stop Notice. I agree with Mr. Philpotts-Brown that the Stop Notice does not comply with subsection 22A(4) of the Town and Country Planning Act in that it does not state the name of the person to whom it is directed. There is indeed also no proof forthcoming from the K.S.A.C. that the Stop Notice was posted in a conspicuous place as described by subsection 22A(5) of the Planning Act.

76.Whilst therefore, the Stop Notice does have defects in that it does not comply fully with the relevant sections, at the same time it is quite clear that the Notice purports to have been issued by the K.S.A.C., and it does require the immediate cessation of the unauthorized development. It is also obvious that the Notice was received by the Defendants, and not only did they not comply with it, but they took a decision deliberately not to obey it, allegedly for the reasons put forward by the 2nd Defendant in paragraph 15 of her Affidavit.

77. I now turn to address the Defendants' contention that they did not receive an Enforcement Notice, that such a Notice is required under Section 23 (1A), and ought to be issued before an application for a court

order. In my judgment, whatever may be the interrelationship between the stop notice and an enforcement notice, the failure to serve a stop notice or an enforcement notice would not prevent the K.S.A.C., or any of the planning authorities, from seeking injunctive relief. The clear words of section 23B contemplate that the K.S.A.C. may apply for the injunction, before they have issued a stop notice or enforcement notice, whilst issuing such notices, after issuing such notices, and in between issuing such notices. The authorized planning authorities may apply for the injunction, **whether or not they have exercised or are proposing to exercise any of their powers under this Act.**

78. I completely agree with the analysis by Lord Clyde at paragraph 64 of the **Southbucks** decision, in analyzing the English counterpart of our section 23B, where he makes the point that this provision widened the planning authorities previously existing powers to apply for an injunction and that the authority may apply for an injunction whether they have exercised the power under the same Act to issue planning contravention notice, enforcement notice, breach of condition notice or stop notices. However, the Court in exercising its discretion and in deciding whether or not to grant the injunction is permitted to take into account the facts regarding any other remedy which the authority may have pursued, or the fact that they have not pursued any other remedy.

In my judgment, the Court of Appeal's decision in the **Best Buds** case does not support a contention that it is mandatory that a Stop Notice and/or an Enforcement Notice must be issued and served. Nor does the decision support a position that a Stop Notice and/or an Enforcement Notice must be served by the K.S.A.C. before making an application for an injunction. The facts in **Best Bud** were different from those in this case. There was no dispute as to whether or not an Enforcement Notice should or should not have been issued, as has been raised by the Defendants in this case. In **Best Buds** a Stop Notice and an Enforcement Notice were both issued and served. What the Court of Appeal decided,

on the facts before it, the Court being satisfied that the Enforcement Notice had been served only on the occupier, is that it is mandatory for the Notice, having been issued, to be served on both the owner and the occupier.

79.Another submission made on behalf of the Defendants, was that the remedy of an injunction is only available where the K.S.A.C. establishes that other legal avenues are inadequate or closed, and that this is not so, because the K.S.A.C. could have used the provisions of section 10 of the Building Act. In order to examine the correctness of this submission, it is necessary to examine the provisions of both Acts.

Section 2 of the Planning Act defines the "local planning authority" in such a way that the Council of the K.S.A.C. is the authority in relation to the Parishes of Kingston and Saint Andrew, and in relation to any other Parish, it is the Parish Council of that Parish. "Authority" is defined as meaning the Town and Country Planning Authority appointed pursuant to section 3 .

80. By virtue of section 23 B of the Planning Act, the Council of the K.S.A.C., as well as the Government Town Planner and the Authority have the exact same jurisdiction to seek an injunction under the Planning Act. None of the other Parish Councils or the Government Town Planner or the Authority can bring an action under the Building Act.

The interpretation section of the Building Act defines the Building Authority as follows:

Section 2

" Building Authority" and "Corporation" mean the Council of the Kingston and Saint Andrew Corporation appointed and constituted under the provisions of the Kingston and Saint Andrew Corporation Act, or such other body as may be, by order of the Minister, substituted for that Corporation for the purposes of this Act in pursuance of the powers contained in this Act;

Section 26 of the Building Act states:

26. Transfer of powers of Building Authority.

It shall be lawful for the Minister, by order, to transfer all the rights , powers, duties, immunities and discretions by this Act conferred on the Building Authority from the Council of the Kingston and St. Andrew Corporation to any other body and to constitute such other body the Building Authority for the purposes of this Act; and similarly, from time to time to re-transfer such rights, powers and duties from such substituted body to the Council of the Kingston and Saint Andrew Corporation or any other body.

This means that the Building Authority may or may not be the K.S.A.C. at any given time.

Where one is aggrieved by a decision by the Building Authority under the Building Act, the appeal is made to the Chief Technical Director whereas under the Planning Act the appeal is to the Minister.

81. I agree with Miss Bennett's submission (in her Written Reply/Response) that the fact that the K.S.A.C. now wears the hat of the Building Authority (under the Building Act) as well as that of the Local Planning Authority (under the Planning Act), does not mean that the remedies under the 2 Acts are interchangeable. One must test the proposition put forward by the Defendants by taking it to its logical conclusion and in so doing, the premise is demonstrably erroneous. For the submission put forward by Mr. Philpotts–Brown to be correct, it would mean that the Government Town Planner, the Town and Country Planning Authority, and the Parish Councils can all elect to act under either the Planning Act or the Building Act and that is simply not so; only the Building Authority can act under the Building Act. So the real question, for determination, would be whether the **Local Planning Authority** has alternative remedies, and not whether the Claimant the **K.S.A.C.** has alternative remedies. Any other remedy that may be considered an alternative remedy is to be found only in the Planning Act and not the Building Act. The role of the Building Authority under the

Building Act is different than the role of the Local Planning Authority under the Planning Act. The Planning Act covers development, which can include building, but the Building Act covers, Building.

82. As regards the cases cited by Mr. Philpotts-Brown, viz. **Stoke-on Trent**, **Stafford Borough**, **City of Bradford Metropolitan**, and **Vale of White Horse**, the ratio of some of these cases turns on the wording of the relevant Statutes which specifically called upon the relevant authority to form an opinion as to the adequacy of another proceeding or remedy. I note also that all of these cases (with the exception of the **Vale of White Horse** case, which does not in any event deal with planning law) were decided before the amendment to the U.K. Planning Act of 1990, which added section187B. Similarly, the case of **K.S.A.C.v. Auburn Court and Perrier**, 25 J.L.R., was decided before the addition of section 23B to the Jamaican Planning Act in 1999. Again, Lord Hobhouse in the **London Borough of Croydon** case expresses the matter well. At page 307 he states:

...section 187B has radically transformed the matters which the court has to consider, ...In those (earlier) *cases the court was concerned with an exceptional jurisdiction...That jurisdiction derives from the case of Gouriet v. Union of Post Office Workers and was described.....in these terms:*

It is made plain by the highest authority that the jurisdiction to grant an injunction in support of the criminal law is exceptional and one of great delicacy to be exercised with caution. ....

Under section 187B, the position, as manifestly intended by the legislature, is a much more simple one. It is an application for an injunction which may be made when the criteria in section 187B are satisfied and it is not necessary to consider the more difficult questions of public policy and statutory intent which have to be considered when an injunction in support of the criminal law is being applied for.

It follows that when an application for the permanent injunction is being heard, the matters which have to be considered by the court under section

187B are of a much narrower compass than are potentially raised by the exceptional jurisdiction.

83. In other words, section 23B confers an express right to the planning authorities to apply to the court for an injunction once the criteria in section 23B are satisfied, i.e. that the K.S.A.C. consider it necessary or expedient for any perceived breach of planning control to be restrained . Therefore an application pursuant to this section does not invoke the Court's exceptional jurisdiction with regard to the granting of the civil remedy of an injunction in support of the criminal law. It does not involve the question and scope of the court's reserve power as discussed in the **Stafford Borough Council** case. I think, though, just as Lord Clyde stated in the **Southbucks** case, it is appropriate that the court should have regard to the other remedies available to the authority which it has or has not utilized, as part of the Court's surveillance of all of the circumstances relevant to the application of its discretion. The Court will also look to see what remedies were available to the Authority in respect of the criminal law, and the nature of those remedies. The K.S.A.C.'s other powers under the Planning Act which lead to criminal sanctions include the service of Stop Notice and Enforcement Notice and the initiating of criminal action where the Notices are ignored. Where an Enforcement Notice sets out steps to be taken, which may include demolition of the building, the K.S.A.C. may enter onto the premises and take those steps. One of the ultimate sanctions that can arise in certain circumstances where the Enforcement Notice is ignored, is for the land to be forfeited to the Crown.

84. As in the **Stoke-on-Trent** case, it does seem to me that, as argued in the K.S.A.C.'s Written Submissions in Reply, that the criminal sanctions would not have been an adequate or timely remedy such that it would have halted the continued construction on the land. Nor would it have prevented occupancy in circumstances where, the K.S.A.C. allege the existence of numerous major breaches.

85. I also agree that in any event another distinction to be drawn in relation to the **Stoke-on -Trent** case is that breach of the injunction will not lead to more onerous penalties than the penalties imposed for the offence since at best, the penalty would be the same, demolition of the building and/or imprisonment for failure to comply with the Order, and at worst the penalties would be greater, potentially involving payment of daily penalties, and forfeiture of the interest in the land to the Crown. In this regard, sections 24 of the Planning Act and section 10 of the Building Act are relevant.

86. I am therefore of the view that the K.S.A.C. were entitled to pursue the remedy of an injunction provided that they meet the criteria set out in section 23B of the Planning Act. As the section unambiguously states, they were not obliged to pursue other remedies before approaching the Court.

87. The Court will generally decline to grant the remedy of an injunction if damages would prove to be an adequate remedy. It is quite clear to me that the K.S.A.C. is seeking to act in protection of public law rights and is entrusted with a duty to enforce the Law as set out in the relevant planning legislation. In addition, if the K.S.A.C. is correct in their allegations as to the breaches carried out, and as to the unsafe condition of the building, the potential for damage to countless third parties, danger of loss to life, limb and property, and the potential danger to adjoining lands and occupiers, and users of adjoining roadways, is of a nature and possesses such characteristics that damages would plainly not be an adequate remedy.

88. I turn now to a consideration of the relevant factors that should be considered in deciding how to exercise my discretion justly. It is clear that the Defendants have acted in breach of the Planning Act and of the Building Act. They have erected a building and carried out a development without first seeking the permission of the relevant authorities. It is not my function to re-assess the matters which have been the subject of a

planning judgment by the statutorily appointed authority, i.e. the K.S.A.C. as the local planning authority under the Planning Act and the K.S.A.C. as the Building Authority under the Building Act. This is the main reason why I do not consider it my duty to plough through the facts upon which the K.S.A.C.. say they acted and to deal with, for example, the Defendants' assertion that the building has been certified safe for occupancy by a structural engineer, or the statement by an architect retained by the Defendants , who claims that the measurements are within acceptable business standards.

89. However, I have to take into account the factors, upon which the K.S.A.C. say they based their several decisions, not by way of re-assesssment, but rather as part of my general consideration whether the circumstances are such as to warrant the grant of the particular remedy of an injunction. See paragraph 71 of the **South Bucks** case. In her First Affidavit, the K.S.A.C's Director of Planning described all of the factors that the K.S.A.C. took into account and in paragraph 36 she states that the K.S.A.C. believes that the circumstances outlined are urgent and consider it necessary or expedient for the breach of planning control to be restrained. Parliament imposed as a pre-condition for the application by the K.S.A.C. that they must so consider the situation in that manner, i.e. as necessary or expedient for the breach to be restrained by injunction. That initial step of consideration is one that I find that the K.S.A.C. has taken in this case. However, it is for the Court to decide whether or not to grant the injunction, and as Lord Clyde commented at paragraph 64 of the **South Bucks** case, the decision by the authority to make the application cannot determine the question of whether the Court should or should not grant the injunction.

90. In my view, the concerns which the K.S.A.C. have expressed are of a serious nature, and concern an entire neighbourhood, i.e. the Golding Avenue and University Grove community in Elletson Flats. There was even a letter written to the K.S.A.C. expressing such concerns, and

indeed, it is this letter that acted as a catalyst, sparking the K.S.A.C.'s investigations. The nature of the breaches identified are substantial and varied. The setback problems are critical and the building having already been built in breach, cannot be cured and the building remain as is. It is difficult to see how the K.S.A.C. could waive such basic and important requirements as the Defendants have requested, in their letter to the Mayor. The breach of the setback requirements and the fact that the building is built too close to the boundaries will inevitably lead to breach of privacy issues, as well as the potential loss and damage to people and to property, including on adjoining property and on adjacent roadways should the structural integrity of the building be so impaired that the building collapses. There would also be changes in the aesthetic and other characteristics of the lands and community since the lands are zoned for residential use and there would be alteration of the present single family residential type use to residential multi-family, motel, hotel or other use. It is not difficult to see that the over-intensive nature of the development will reek havoc with the environment, combined with the fact that there is said to be no proper provision for sewage connection, the property and development being illegally connected to the NWC's central sewage system, and there being no provision for proper drainage and surface water, storm water run-off. The parking space problems both on property, and the potential for cluttered parking on the roadways and sidewalks, and the detrimental effect to the free flow of traffic on Golding Avenue as well as University Grove cannot be taken lightly. The fact that the 3rd Defendant claims to be purchasing a nearby Lot to deal with the parking issues is not a solution to the problem. Certainly the K.S.A.C. have not indicated that they consider that it alleviates or solves the parking problems, which problems appear to be multi-dimensional. There are also other issues including, the allegation as to the construction being poor and in breach of building Codes and requirements, and lack of proper fire and other safety procedures. All in

all, I do not think it is an exaggeration to say that this is an alarming situation and to my mind, it bears all the hallmarks of a planning authority's nightmare.

91. I also look at the fact that the K.S.A.C. have, in addition to analyzing and focusing on the breaches, clearly had regard to the hardships which may be suffered by the Defendants, including the financial costs associated with the existing construction, the time and effort put into the entire project, the fact that there are possibly prospective purchasers or tenants who are waiting to use and occupy the building, and the associated lost potential revenue from rental income.

92. In my judgment, this is a case where the Defendants have acted in flagrant and deliberate disregard of the Law persistently, and at several stages of the process. Firstly, they proceeded to construct this very intensive, and seemingly expensive building and development, without any planning or building approval. It is difficult to accept, even if they thought that there was already approval for a 2 storey building, which I do not think they could reasonably have thought, that they could have considered that such an approval would also apply to the erection of a 3 storey building. In any event, the Defendants clearly admit there was no formal application for approval. It is difficult to see how , in relation to a large-scale project such as this, one could deem it fit to proceed without seeking formal approvals, or in any event, independent legal advice. It would either seem foolhardy, or designed to jump the gun and pre-empt the statutory procedures. To make matters worse, the 2nd Defendant makes the amazing admission that even after receiving the Stop Notice, the Defendants not only ignored it, but decided that it was up to them to determine what was best for the community. In so deciding, they concluded that it was appropriate to hurry up and finish the building, in flush disobedience `of the edicts of the K.S.A.C., the statutorily empowered authority. In addition, the Defendants chose to advertise the building for rental and occupancy, notwithstanding the stage that the

matter had reached and the posture taken by the K.S.A.C. up until then and throughout. There has therefore been unsuccessful enforcement and deliberate non-compliance. In addition, even when the Defendants first applied to the K.S.A.C. for approval in January 2009, after Suit was filed, they persisted in describing the building as consisting of 12 units, and it is only in the last application that a reference is made to the a structure comprising 30 apartment units. Whether misguided, or deliberate, these actions manifest clear indications that the Defendants will continue their unlawful actions and perpetuate and compound the breaches identified, including populating the building and the lands with occupants, unless effectively restrained by way of injunction.

93. In my view, none of the hardships which may be encountered by the Defendants weigh against the grant of injunctive relief. Unlike the facts in the **South Bucks** case, there is no question of hardship in relation to exceptional issues such as health issues. The hardships seem to be all of the Defendants' own making, in blindly, albeit it may be misguidedly or with good intentions , pursuing the dream which they claim to have had, of providing affordable and comfortable accommodation for students.. I have no doubt that those are most laudable aims. However, what puzzles me is why these aspirations could not have been pursued, as is done in the majority of cases by law-abiding citizens, in compliance with the statutory procedures that Parliament has laid down, and not in complete disregard of the Law. The fact that the K.S.A.C. have taken the potential hardships into account, yet have nonetheless resolved that it is necessary or expedient to seek the injunctive relief, weighs in favour of, though is not decisive, in granting the relief. The Court must accord respect to the balance which the local planning authority has struck between the public interest in securing the enforcement of planning policy and decisions against the private interests and potential hardships for the individuals alleged to be in breach of planning controls. It must at

the same time itself determine ultimately what is the appropriate and just remedy .

94. As part of my consideration of the just manner in which to exercise my discretion, I return to the fact that the Defendants have filed an Appeal to the Minister in relation to the K.S.A.C.'s decision to refuse the Defendants second application, which took the form of requesting approval for retention of the building. As stated previously, the case of **Official Custodian for Charities v. Mackey** satisfies me that the Court can proceed to determine this Claim, which was filed long before the application, the refusal of which is being appealed. The headnote in that case, at page 169, paragraph B, and the pages there referred to, support a conclusion that even if the Minister were to allow an Appeal, that would not be a Defence to the K.S.A.C.'s present Claim. Further, I apply the reasoning of Scott J., evinced at page 179 A, to say that what may be done by the Minister would be a matter of speculation at this stage, since I do not know where the Appeal has reached and I have not been informed of any outcome. What is not a matter of speculation is that the Defendants up to the present have no legal right to do what they have done up to now. So I am satisfied that it is correct for me to proceed to deal with this application, notwithstanding the existence of the Appeal.

The real question for me is what is the most appropriate manner with which to deal with the existence of this Appeal. In the **London Borough of Croydon** case, the English Court of Appeal decided that two injunctions should be granted under section 187B of the Planning Act. However, because it was considered that a planning appeal in relation to one building had better prospects than that of another, the injunction in relation to the building with the more favourable appeal prospects, was suspended until the relevant planning appeal had been determined. This decision demonstrates the flexibility of the Court's jurisdiction in relation to injunctive relief, and in particular, in relation to this aspect of planning law. However, in **O'Connor v. Reigate and Banstead Borough**

Council , decided 7th October 1999, the English Court of Appeal had before it an Appeal in relation to a successful first instance application by the local Council for injunctive relief under section 187B of the Planning Act. The injunction was directed at a site in relation to which it was said "It is subject to significant restrictions for development, in particular to residential development to prevent the spread of urban sprawl." –paragraph 2 of the Judgment of Beldam L.J. Under the relevant Law the Council had power to, when it considered an application for consent to a development, to grant that power retrospectively. The argument was that if the consent was backdated the action of the Appellants would then have ceased to be lawful. What had transpired was that the Council's planners, led by Miss Woods, the Council's principal planning officer (Enforcement), had visited the site and seen certain things, and received certain information that suggested that movement of mobile homes or chalets onto the site was taking place without planning permission. When the personnel went back to office they discovered that an application for planning consent had been made. The Council decided to apply for the injunction before the application for the consent was considered. The Court rejected arguments that the Judge had failed to grasp that the authority had such power, and that the judge had wrongly in effect placed himself in the position of the planning authority, and decided for himself whether or not the planning application which the appellants had made would be likely to succeed. – Paragraphs 9, 10, and 13. At paragraph 10 Beldam L.J.stated:

...In the passages referred to, it seems to me that the judge was referring to the basis of Miss Wood's decision. She clearly regarded the possibility of planning consent being granted for residential use of this kind as unlikely in the Green belt area. That was a view which, in my opinion, was not unreasonable, having regard to the contents of the two plans concerning the status of the Green Belt. As to the first ground, the judge was clearly entitled to take the view that the moving of mobile homes or chalets on to

the site for residential use before the application for consent had been considered was a clear attempt to pre-empt the decision of the authority.

95. When I consider all of the relevant factors in this case as discussed above, I have formed a clear, but reluctant view. Reluctant, having regard to the great waste of effort and money expended on this ill-fated and unlawful development. Regrettably, the Defendants, seemingly swept away by their dream, adopted a blinkered approach to the law and are the authors of their own misfortune. There are really no conceivable humane grounds that favourably affect their situation. My view is that it is appropriate and just to grant the relief sought. In my judgment, injunctive relief under section 23B of the Planning Act is warranted, proportionate, and commensurate in the circumstances. I am also of the view, given, amongst other factors, that this is a clear-cut case of breach, and the nature of the breaches, that this is an appropriate case to grant an immediate as opposed to a suspended, injunction. However, in light of the imminence of the Christmas Holidays, and all of the circumstances that it brings, including the disruptions in commercial activity that frequently occur around this time, I have varied the time periods asked for by the K.S.A.C. in relation to the mandatory injunctions sought. Save for that variation, I grant all of the relief prayed in the Fixed Date Claim Form.

96.. My orders are as follows:

A. It is declared that the Defendants, their agents and/or servants have developed lands located at 2 and 4 University Grove, Elleston Flats, in the Parish of Saint Andrew contained in Certificates of Title registered at Volume 1102 Folio 268 and Volume 1102 Folio 267 without obtaining planning permission from the Claimant.

B. It is declared that the development of the land being carried out by the Defendants their agents and/or servants is unlawful.

C. The Defendants, their agents and/or servants are restrained from carrying out any further development whether building, engineering, mining and/or operations in on over or under the land.

D. The Defendants, their agents and/or servants are restrained from carrying out works for the improvement, addition, modification and/or other alteration of any building on the land which works affect the exterior of the building and/or materially affect the external appearance of the building on the land.

E. The Defendants, their agents, and/or servants are restrained from using and/or occupying the land, and/or from carrying out any activity on the land associated with the use and/or occupation of the land; or from permitting the use and/or occupation of the land; and/or from permitting the carrying out of any activity on the land associated with the use and occupation of the land unless and until approval is sought and obtained from the Claimant and the building is certifiably safe for use and occupation.

F. The Defendants, their agents and/or servants are mandated and ordered to:

(i) pull down and/or demolish the unauthorized buildings or other operation in on over or under the land to the Claimant's satisfaction by 5: 00 p.m. on Friday, the 8th of January 2010.

(ii) remove all rubble, debris or other item or material resulting from pulling down and/or demolition of the unauthorized building or other operations in on over or under the land by 5:00 p.m. on Friday, the 15th January 2010.

(iii) remove all paraphernalia associated with the unauthorized building , engineering and/or other operations in on over or under the land by 5: 00 p.m. on Friday, the 15th January 2010.

(iv) restore the building and/or other land to its original condition prior to the unauthorized development and to complete such restoration by 5:00 p.m. on Friday, the 15th January 2010.

(v) restore the building and/or other land to the satisfaction of the Claimant by 5: 00 p.m. on Friday, the 15th January 2010.

G. Liberty to the parties to Apply.

H. Costs to the Claimants to be paid by the Defendants within 30 days of agreement, taxation or other mode of ascertainment.