SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO. 1 OF 1997

BETWEEN:

MARCUS DEFREITAS

Appellant

and

THE PHYSICAL PLANNING AND DEVELOPMENT BOARD

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N. J. Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. J. Delves for the Appellant
Mrs. J. Jones-Morgan for the Respondent

1998: March 27;
April 20.

Administrative Law - Breaches of the Town and Country Planning Act - Reprimand and discharge on two breaches – Change of use, contrary to section 31[1] of the Act - Whether it was the company, or the appellant, as one of its directors which ought to be held liable for the breaches - Huckerby v Elliot [1970] 1 AER 189 - Whether there was a 'charge of use' of the buildings in issue within the meaning of the Act - Question of fact or of law? - Guildford Rural District Council v Penny [1959] 2 AER 111 considered - Quaere: if a use continues but more intensively, can the intensification in itself amount to a change of use? - Birmingham Corporation v Ministry of Housing [1963] 3 AER 668 - East Barnet UDC v British Transport Commission [1961] 3 AER 878 applied - Whether the enforcement notice served on the appellant was valid in law, as not accurately describing the property to which it referred - Patel v Betts [1978] J.P.L. 109 [D.C.] considered – The test to be applied – Eldon Garages Ltd. v Kingston B.C. [1974] 1 WIR 276 applied – East Riding County Council v Park Estate Ltd. [1956] 2 AER 669 H.L. distinguished - Whether there was sufficient

evidence to support a charge of carrying out development by extending the building in question. Appeal dismissed.

JUDGMENT

MATTHEW J. A. [AG.]

The Appellant was found to have committed four breaches of the Town and Country Planning Act 1992, No. 45 of 1992, by the learned Magistrate, His Worship Mr. Errol Clinton Mounsey, on January 19, 1996.

In respect of the first breach, failing to comply with an enforcement notice contrary to Section 18[5] of the Act, he was reprimanded and discharged.

In respect of the second breach, carrying out development other than specified in Section 16[4], namely erecting an extension to the Bacchus building, contrary to Section 31[1], of the Act, he was also reprimanded and discharged.

In respect of the third breach, change of use of the E.C.A. building to warehousing storage, wholesale and retailing of cement, contrary to Section 31[1] of the Act, he was fined $500.00 to be paid in one month's time or in default one month imprisonment.

And in respect of the fourth breach, change of use of the Bacchus building from residential premises to commercial and warehouse use contrary to Section 31[1] of the Act, he was fined $1,000.00 to be paid in one month's time or in default one month imprisonment. The learned Magistrate ordered that both terms of imprisonment were to run concurrently.

Learned Counsel for the Appellant filed initially 7 grounds of appeal and before the hearing obtained leave to argue a further ground, namely, ground 8. Counsel however withdrew grounds 5 and 6. Counsel whose notice of appeal was originally in respect of Trans Caribbean Traders Ltd. and Marcus DeFreitas also sought leave to withdraw the appeal of Trans Caribbean Traders Ltd.

The consequence of this withdrawal was that the first ground of appeal fell by the way side for it was in respect of the first Defendant/Appellant. That ground read –

> "The learned Magistrate erred in law in finding that the first named defendant/appellant was served with an enforcement notice."

And indeed learned Counsel for the Appellant did not advance any argument on this ground of appeal.

Another ground of appeal which was rendered otiose by the withdrawal of the appeal of the first named Defendant/Appellant was ground 7. That ground read –

> "The learned Magistrate erred in law in failing to recognize and or give effect to the legal distinction between the second named defendant/appellant and the first named defendant/appellant and DeFreitas Investments Holdings Ltd. the latter two being companies of which the first named defendant/appellant is a director."

During the hearing I asked learned Counsel why was he pursuing this argument seeing that the company was not convicted and only Marcus DeFreitas was fined.

Counsel submitted in this respect that Marcus DeFreitas was neither the owner nor occupier of the premises. Counsel further submitted that it should have been the company that ought to be found liable. Counsel referred to the case of HUCKERBY V ELLIOT1970 1 A.E.R. 189.

The Court drew Counsel's attention to Section 31[6] of the Town and Country Planning Act. The subsection states:

> "Where any body corporate commits an offence under this Act and the offence is proved to have been committed with the consent or connivance of any director, manager, secretary, or other officer of the body corporate, the officer responsible as well shall be liable to be prosecuted and on summary conviction punished accordingly for such offence."

It is to be noted that the learned Magistrate found as a fact that the Complainant had proved its case to the satisfaction of the

Court against the company and against the Defendant Marcus DeFreitas. He went on to fine Marcus DeFreitas only because he held the company was a closely held family company managed single handedly by Marcus DeFreitas.

The Huckerby case illustrates the same principle found in section 31[6] for there the Secretary/Director who had pleaded guilty was charged with an offence committed by the company with his consent. Of course the other Director who knew little of what was going on was held not liable. See also Attorney General's Reference [No. 1 of 1995] 1996 4 A.E.R. 21.

I do not entertain any doubt that the Appellant was correctly convicted for breaches of the Town and Country Planning Act.

The remaining grounds of appeal advanced by the Appellant were as follows:

[2] The learned Magistrate erred in law in ruling that there was a change of use perpetrated by the defendants/appellants of the Melville Place building within the meaning of the Town and Country Planning Act, Cap 251.

[3] The learned Magistrate erred in law in ruling that there was a change of use perpetrated by the defendants/appellants of the "ECA" building within the meaning of the Town and Country Planning Act, Cap.251.

[4] The learned Magistrate erred in law in failing to uphold the submission made on behalf of the defendants/appellants that the enforcement notice was bad.

[8] The evidence on the charge of carrying out development by extending the Creighton Bacchus building was insufficient to support the verdict which is unsafe and unsatisfactory.

I shall now deal with each of those grounds of appeal.

Change of use of the Melville Place building

Another name for the Melville place building is the Bacchus building. I did not perceive learned Counsel for the Appellant was

strenuously arguing this ground of appeal. In her skeleton arguments learned Counsel for the Respondent submitted that the question whether there was a change of use of the Bacchus building within the meaning of the Act was in her opinion a question of fact and therefore the decision of the learned Magistrate was one with which this Court should not interfere. In support of that submission she cited the case of GUILDFORD RURAL DISTRICT COUNCIL V PENNY AND ANOTHER 1959 2 AER III.

In this case justices were of the opinion that the increase in number of caravans on a portion of land from eight to twenty-seven did not constitute a "development" within the Act, and quashed an enforcement notice issued by the planning authority. The Divisional Court reversed the decision of the justices. On appeal from the decision of the Divisional Court, the Court of Appeal held, inter alia, that the question whether the increase from eight to twenty-seven caravans constituted a material change in the use of the land so as to constitute "development" within the Act was a question of fact, and therefore, the decision of the justices was one with which the Court should not interfere.

In my view there was an abundance of evidence from which the learned Magistrate quite rightly found there was a change of use of the Bacchus building. Bentley Browne, the Town Planner, stated that planning permission in the area of those buildings close to the Ministry of Agriculture would not be given to change from residential to a cement factory because there is a local plan for the area which states quite clearly that warehousing activities and those incompatible to a residential neighbourhood and which affect the amenities in the area are prohibited. He said the local plan had been in force since 1987. He stated that the building in question is on the map and it is shown as a residential building in 1987 and from his records no one ever applied to change the building from residential to commercial use. Browne stated categorically that the building which was formerly a residential building was at the time he

gave evidence used for storage of cement, flour and other hardware.

Ardon Nelson, Physical Planning Officer, visited the Bacchus building on December 2, 1993 and on May 17, 1994.

On the first occasion Marcus DeFreitas was there alone. He said the purpose of his visit was to investigate developments that were taking place at the Bacchus building. He discovered that the two buildings were used for storage of flour, galvanize, steel, cement deodorants etc. He testified that the larger building was formerly used as a residential building. He said when he visited the building trucks were off loading cement.

On the second occasion he visited the two buildings he again met trucks off loading cement.

When Marcus DeFreitas was cross-examined by learned Counsel for the Respondent he said –

> "When Mr. Nelson visited the main building it was not used as a residence. This building is used for the distribution of food items and some hardware products. It is so used today……At the time of Mr. Nelson's visit cement occupied the back building. The middle building had cement in 1993."
>
> This ground of appeal fails.

Change of use of the ECA building

It cannot be denied that the ECA building was previously used as a sort of warehouse. Bentley Browne stated in evidence that the site opposite the Chinese Embassy was formerly used as a storehouse for agricultural products by the East Caribbean Agencies and it is now being used for warehousing and storing cement. Ardon Nelson stated that the building was at one time used as an agricultural depot but that from November 1993 to May 1994 he observed that the building was being used to store cement.

Marcus DeFreitas, Douglas DeFreitas and Leroy Creese testified that the ECA building was also used to carry on other trading in tyres, cleaning chemicals, paint, Hairooun products.

Under cross-examination Marcus DeFreitas stated that the ECA building was now being used for the storage and sale of cement, plywood, tyres and other products and that cement was introduced in September 1993 and at that time occupied 50 percent of the space.

Learned Counsel for the Appellant submitted that when one looks at the evidence as a whole one finds that there was a lot of commercial activity going on at the E.C.A. building before August 1, 1993 and therefore there was no change of use. Counsel referred to the case of EAST BARNET URBAN DISTRICT COUNCIL V BRITISH TRANSPORT COMMISSION 1961 3 A.E.R. 878

Learned Counsel for the Respondent posed the question: if a use continues but more intensively, can the intensification in itself amount to a change of use?

Counsel referred to the following cases:

BIRMINGHAM CORPORATION V MINISTER OF HOUSING AND LOCAL GOVERNMENT 1963 3 AER 668;

JAMES V SECRETARY OF STATE FOR WALES 1966 3 AER 964

In the Birmingham Case, the Minister had decided that the accommodation of 7 separate families in a single large house, without any physical alterations to the premises, was not capable of being a material change of use, because the house was still being used for residential purposes. The Court, however, disagreed, there was a substantial difference between a house being used as a dwelling for a single family and one so used by as many as seven separate families. The Court therefore sent the case back to the Minister so that he could consider whether this change of use was a material one from a planning point of view.

The Court has given the same answer, in relation to an intensification of the use of a caravan site.

Counsel submitted that the answer can only turn on the facts and the question whether there was a change of use of the E.C.A.

building is a question of fact and the Court should not interfere with the findings of the learned Magistrate.

The learned Magistrate found as a fact that there was a change of use of the ECA building. He said he was not unmindful of the fact that the ECA building was for a number of years used as a wholesale and retail facility for agricultural produce and other goods and it was later that it was used primarily as a warehouse for the storage and distribution of cement.

I agree that in the case of the ECA building the change of use is more of a question of change in the extent of use. In EAST BARNET URBAN DISTRICT COUNCIL V BRITISH TRANSPORT COMMISSION the Court held that the question whether there had been such a change of use of certain land as would constitute development was one of fact and degree.

In my judgment there is evidence from which the learned Magistrate could arrive at his findings. This ground of appeal fails.

The enforcement notice being bad

Learned Counsel for the Appellant submitted that the notice did not accurately describe the property to which it referred. When he was re-examined by learned Counsel for the Respondent Bentley Browne stated that the enforcement notice which was served in July 1993 did not specify where the offence was being committed. Counsel referred to the case of EAST RIDING COUNTY COUNCIL V PARK ESTATE LTD 1956 2 AER 669.

Morris King, the Senior Building Inspector, served the enforcement notice in November 1993. The notice is dated 25th November 1993. It refers to development specified, viz, changing the use of a residential building at Murray road to a storage room and it is addressed to the Appellant as owner/occupier.

In her skeleton arguments learned Counsel for the Respondent submitted that an enforcement notice is a nullity and thus devoid of legal effect if it is defective upon its face. MILLER-MEAD V MINISTER OF HOUSING 1963 2 QB 196, 226/227. But

she said in the instant case there was no question of uncertainty or ambiguity in expression.

In PATEL V BETTS 1978 J.P.L. 109, D.C. Mr. Patel had complained of three errors in an enforcement notice. Forbes J. in giving the decision of the Divisional Court on July 15, 1997 said –

> "What had to be shown for the appellant to succeed was that the totality of the errors in the notice amounted to an injustice. One had to bear in mind that the appellant knew what he was doing, he knew when he started to use the room as a stationery store, and he knew which of the two front doors was being used."

In Eldon Garages Ltd. v Kingston – upon Hull County Borough Council 1974 1 WIR 276 Templeman J. in a similar case laid down that the basic test is whether on the true construction of the notice, it is clear to the recipient of what he has been accused. He also accepted that the enforcement notice must be construed against the history and background and state of knowledge of the recipient. This means, as the present case illustrates, that technical errors will not invalidate the notice.

While the enforcement notice in this case did not specifically say it was with reference to the Bacchus building this could not have been in any doubt in the mind of the Appellant for at no time was it ever being alleged that in respect of the E.C.A. building there was a change of use from residential to storage. The Appellant's subsequent conduct after being informed of the notice also goes to prove that no injustice could have been done to him by the notice,.

In the East Riding County Council case the House of Lords held that the enforcement notice was bad because it did not allege that the development contravened previous planning control and because the notice failed to specify the nature of the alleged contravention. The notice exhibited in this case clearly alleges that the change of use of the residential building at Murray road to a storage room contravenes certain provisions of the Town and Country Planning Act.

This ground of appeal likewise fails.

Insufficient evidence on charge of carrying out development by extending the Bacchus building

Learned Counsel for the Appellant submitted that there was in fact no evidence to support the charge of erection of an extension to the building formerly the dwelling house of Creighton Bacchus during the relevant time.

Learned Counsel for the Respondent on the other hand relies on the evidence of Eugenia Stewart and Bentley Browne in support of the charge.

Eugenia Stewart stated that in or about July 1993 Marcus DeFreitas contacted Stewart Engineering to allow him to use their water and electricity as he was going to build something. She said the company gave him permission to use their water and electricity and he did so for about two months. She said she did not find out what DeFreitas wanted to build when he asked to use the water and electricity but as events would turn out she became painfully aware. Her access to her office was impeded by trucks unloading cement and the activities of the cement warehouse interfered with her health. From her evidence there is a reasonable inference that DeFreitas was using the water and electricity to build or extend a building for use as a cement depot.

The fact that under cross-examination Mrs. Stewart stated that her company gave DeFreitas permission to use water and electricity for two months around June to July does not assist the Appellant. These were approximate dates close enough to the date in the charge. The Appellant is charged that between 1st day of August 1993 and 26th day of November 1993 without first having obtained permission as required by the Town and Country Planning Act 1992, he erected an extension contrary to Section 31[1] of the Act. Is his defence that he erected the extension without permission but he did so in June or July and therefore he is not guilty?

Bentley Browne testified that the local plan for the area in question has been in force since 1987 and at the time he was giving evidence he said no planning applications had been received from any of the defendants to extend or expand the main building.

Ardon Nelson who had visited the location on December 2, 1993 could say that he saw an extension at the back of the larger building measuring about 800 square feet and the extension was recent.

Even Marcus DeFreitas himself admitted in evidence as follows:

> "The Creighton Bacchus property consists of 3 buildings, one to the front towards the main road, the main building and to the back a building that houses the garage, servants quarters and storage rooms. I did not carry on an extension to the front building between August 1,1993 and November 26, 1993. I know of one extension to the second building during this time. I don't know of any extension to the back building during this period either.'

I am of the view that there was sufficient evidence upon which the learned Magistrate could have arrived at his conclusion.

This ground of appeal also fails.

I would therefore dismiss the appeal with costs to the Respondent to be taxed, if not agreed.

A.N. J. MATTHEW
Justice of Appeal [Ag.]

I Concur.

C. M. D. Byron
Chief Justice [Ag.]

I Concur.

ALBERT REDHEAD
Justice of Appeal