JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 99/1997

SUIT NOS. M101 and 102 of 1996

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	AUBURN COURT LTD.	APPELLANT
A N D;	THE KINGSTON & ST ANDREW CORPORATION THE BUILDING SURVEYOR	1ST RESPONDENT
A N D:	THE TOWN & COUNTRY PLANNING AUTHORITY – THE GOVERNMENT TOWN PLANNER	2ND RESPONDENT

Rudolph Francis and Richard Rowe for the Appellant

Lennox Campbell, Q.C. Deputy Solicitor-General and Susan Reid-Jones Crown Counsel instructed by the Director of State Proceedings for the respondents

January 10, 11,12,13, 14, 17, 18, 2000 and July 31, 2001

DOWNER, J.A.(Dissenting)

PART I

Are the two enforcement notices and the irregularity notice valid?

This important consolidated appeal seeks to set aside the order of the Full Court (Wolfe C.J., Ellis and Clarke JJ) which on 16th May 1997, dismissed two motions M 101 and M 102 of 1996. Auburn Court Ltd. (the "appellant) had sought orders of certiorari and prohibition against the Kingston & St. Andrew

Corporation and its Building Surveyor, and the Town and Country Planning Authority, and its Town Planner. The reasons were delivered on February 16, 1998.

Before the orders were sought in the Supreme Court, a notice of appeal was lodged against the enforcement notice of August 22, 1996 with the Appeal Tribunal established by section 23A of the Town and Country Planning Act (the "Act")but this appeal was discontinued. Also discontinued was an appeal to the Chief Technical Director, the tribunal of appeal, against the decision of the K.S.A.C. not to approve the building plans, submitted by the appellant. This latter appeal was made permissible by sec. 10(2) the Kingston and St. Andrew Building Act (the "Building Act")which reads:

> "(2) Every person who shall erect, or begin to erect or re-erect, or extend, or cause or procure the erection, re-erection or extension of any such building or any part thereof, without previously obtaining the written approval of the Building Authority; or, in case of dispute, of the tribunal of appeal, or otherwise than in conformity with such approval; and every builder or other person who shall, in the erection, re-erection or extension of any such building or part thereof deviate from the plan approved by the Building Authority; or, in the case of detailed or working drawings, by the Surveyor or the tribunal of appeal, shall be guilty of an offence against this Act, and liable to a penalty not exceeding fifty thousand dollars, besides being ordered by the Court to take down the said building or part thereof, or to alter the same in such way as the Surveyor shall direct, so as to make it in conformity with the approval of the Building Authority or the tribunal of appeal." [Emphasis supplied]

This failure to appeal to the Chief Technical Director was regrettable in some ways, as there were conflicts in the evidence of the parties which would have been better resolved by the Tribunal having heard oral evidence, with the

attendant cross-examination. Instead, there was resort to judicial review with affidavit evidence, without recourse to any cross-examination. However, if the crucial issues can be solved by the true construction of statutes and the relevant notices, then the unresolved conflicts in the evidence will be of little moment to the outcome.

This appeal before us has had a chequered career. It was first heard by (Forte P., Bingham and Walker JJA) in 1999, over six days and dismissed with costs for want of prosecution. It was subsequently relisted and heard over seven days last year. It was the first of a series of exceptionally long and complex cases heard during that year. Priorities had to be established, as some of these cases were interlocutory appeals, which required immediate attention. So cases which were first in time were not necessarily first in time in the delivery of judgments.

Another problem with this case, was that leading counsel for the appellant in the Court below was Dr. Lloyd Barnett. In the aborted appeal Mr. Berthan Macaulay Q.C. led for the appellant. The constant factor was Mr. Rudolph Francis who was the instructing attorney-at-law below. It was he who presented the arguments in this appeal. He combined the arguments presented at the previous hearings with a cogent, yet hesitant and rambling submission on the validity of two enforcement notices, and the notice of irregularity. The dates of these notices are important. The first in time was the enforcement notice issued pursuant to section 23 of the Act. The date of issue was 29th April, 1996. The second was the irregularity notice issued pursuant to section 38 of the Building Act. The date of issue was 30th May 1996. The third, an enforcement

notice, was issued pursuant to the Act on 22nd August, 1996. The first and second notices were issued by the Kingston and St. Andrew Corporation, (The "Building Authority"), the first respondent. The third notice was issued by the Government Town Planner, the second respondent.

Was the enforcement notice OF 29th April, 1996 issued by the Local Planning Authority valid?

Arnold White is the Deputy Building Surveyor of the Kingston and St. Andrew Corporation. His affidavit in so far as is relevant runs thus at page 72 of the record:

> "3. That every person proposing to erect or to extend any building in Kingston and St. Andrew is required to give prior notice to the KSAC the Council of which constitutes the Building Authority pursuant to the Kingston and St. Andrew Building Act and also the Local Planning Authority pursuant to the Town and Country Planning Act."

Then as regards the enforcement notice issued by the Kingston and St. Andrew Corporation in its capacity as Local Planning Authority he said:

> "26. That on the 29th April, 1996 I issued an Enforcement Notice on behalf of the Chairman of the Local Planning Authority which notice prohibited Auburn Court Limited from continuing or carrying out any development or operation or using the land at 15 South Avenue and also required the Company to restore the land to its condition before the development took place. There is now produced and shown to me marked "AW 2" for identification a copy of that Notice. "

Section 23 of the Act is important. It provides for the issuance of an enforcement notice, if it appears to the local planning authority that there has been development without the requisite permission. Here is section 23(1) of the Act which addresses the issue:

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

An important limitation on the power to issue an enforcement notice is that it must be issued within five years of the development for which no permission was granted, pursuant to Part III of the Act. Part III also deals with Contents and Effects of Development Orders. Section 10 in Part III is relevant to this case and in so far as material it reads:

> "10.-(1) Every confirmed development order (hereafter in this Act called a "development order") shall –
>
> (d) provide for the grant of permission for the development of land in the area to which the development order applies, and such permission may be granted –
>
> (i) in the case of any development specified in such order, or in the case of development of any class so specified, by the development order itself;

> (ii) in any other case by the local planning authority (or, in the cases hereinafter provided, by the Authority) on an application in that behalf made to the local planning authority, in accordance with the provisions of the development order."

Then section 23(2) in Part V of the Act is of vital importance. It states the obligatory provisions which must be included in the notice. The section reads:

> "(2) Any notice served under this section (hereinafter called an "enforcement notice") shall specify the development which is alleged to have been carried out without the grant of permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, and in particular any such notice may, for the purpose aforesaid, require the demolition or alterations of any building or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations and shall state that any person upon whom an enforcement notice is served is prohibited from continuing or carrying out any development or operations or using the land in respect of which the notice is served." (Emphasis supplied)

An important part of the contents of the notice is that the local planning authority may require such steps as may be specified in the notice, to be taken within such period as may be so specified for restoring the land to its condition, before the development took place. The time which may be specified, in this context, is important. It will vary depending on the availability of skilled professionals and equipment to do the demolition, the nature of the construction, the area in which it is situated, whether it is tenanted and so forth.

It must be a reasonable time. What is essential in the context of this case is that where the local planning authority exercised its discretion to require steps to be taken to restore the land to its original condition there is a discretion coupled with a duty; so once there was a requirement that steps were to be taken, the time must be specified. This was the burden of the submission of Mr. Rudolph Francis for the appellant. He cited **Julius v Lord Bishop of Oxford** (1880) 5 App. Cas. 214; and the later case of **Padfield v. Minister of Agriculture** (1998)A.C. 997 is also relevant in this regard.

Paragraph 2 deals with the effective date of the notice. It reads:

"Effective date of notice	2.	THIS NOTICE TAKES EFFECT, subject to paragraph 5, (a) in relation to the discontinuation of use of land at the expiration of 28 days after the date of service of this notice."

Paragraph 5 will be adverted to later as well as sec. 22(3) of the Act which makes the above period of 28 days mandatory.

Paragraphs 3 and 4 of the enforcement notice at pages 59-60 of the record reads:

"Prohibited regarding use of land and contra-vening of conditions	3.	You are hereby prohibited from – (a) continuing or carrying out any development or operation or using the land in respect of which this notice is issued.; . . ."

Then paragraph 4 at page 60 of the record reads:

> "4. YOU ARE HEREBY REQUIRED on the date on which this Notice takes effect to take the following steps –
>
> - (a) To restore the land to its condition before the development took place;"
> . . . ".

So it is clear that this notice in paragraph 4 omits to state specifically the time within which the landowner was to restore the land to its original condition, before the development took place.

The statutory period provided in section 23(3) of the Act of 28 days within which the notice takes effect is the first period from an operational point in view so it appears in paragraph 2 of the notice. The second period to be stated, in paragraph 4 it must name a period after the notice takes effect. That is the period during which the land is to be restored to condition before the development took place. It cannot coincide with the first period. Such a provision as is stated in this notice at paragraph 4 is null and void. That is the principle stated in the authority of **Burgess v. Jervis** [1952] 1 All E.R. 592, 595 where Somervell LJ. said:

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

> 23(4) enabling the court to say that it shall not come into force until a further date, not being later than twenty-eight days. It is unnecessary to consider for what precise purpose that proviso was inserted, because it does not, to my mind, affect the general construction."

That an enforcement notice which does not comply with the requirement of the Act, is bad on its face and null and void, finds support in the following passage in the speech of Lord Nicholls in **Regina v. Wicks** [1987] 2 WLR 876 at 880 thus:

> "I have phrased the underlying question in this way because it is now well established that where the criminal offence lies in failure to comply with an order made under statutory powers, it is open to the defendant to challenge the lawfulness of the order on certain grounds, by way of defence in the criminal proceedings. Among the most well established of these grounds is lack of vires to make the material part of the order where this is apparent merely from a reading of the order in conjunction with the enabling Act; see, for instance, **Reg. v. Rose, Ex parte Wood** (1855) 19 J.P. 676. That is the first of the two defences which the defendant wishes to raise in my example."

Lord Hoffman in approving a judgment of the Court of Appeal put it this way at page 887:

> "The Court of Appeal (Lord Taylor of Gosforth C.J., Mantell and Keene JJ) dismissed the appeal. Keene J., who gave the judgment of the court referred to the well-known distinction which Upjohn L.J., had made in **Miller-Mead v. Minister of Housing and Local Government** [1963] 2 Q.B. 196, 226 between an enforcement notice which was a nullity ("waste paper") and one which was invalid only in the sense of being liable to be quashed. A notice which on its face failed to comply with some requirement of the Act was a nullity. A notice which could be quashed on the basis of extrinsic facts (for example, because in fact no breach of planning control had taken place) was invalid but not a complete nullity."

Again Lord Hoffman on page 893 approved of the following passage in **Quietlynn Ltd. v Plymouth City Council** [1988] Q.B. 114 where Webster J. said:

> "The law relating to judicial review has become increasingly more sophisticated in the past few decades, and in our view justices are not to be expected to have to assume the functions of the Divisional Court and consider the validity of decisions made by a local authority under [the Act of 1982] in the light of what is now a complex body of law .... In our view, therefore, except in the case of a decision which is invalid on its face, every decision of the licensing authority under [the Act of 1982] is to be presumed to have been validly made and to continue in force unless and until it has been struck down by the High Court; and neither the justices nor the Crown Court have power to investigate or decide on its validity."(Emphasis added)

In **Mead v. Plummer** [1952] 2 All E.R. 723 which followed **Burgess** (supra), Lord Goddard had this to say at 725:

> ..."The recipient must also be told within what time he is to do the work. This notice does not say when it is to take effect. It simply tells the appellant that he is to discontinue using the land for the purpose within fifty-six days after the service of the notice. Counsel for the respondent has suggested that the notice should be read as meaning that the notice will take effect in twenty-eight days and that the appellant has twenty-eight days in which to do the work. We cannot hold that that is what the notice says or that would comply with the section, and that is the opinion expressed by the Court of Appeal in **Burgess v. Jarvis[1952] 1 All E.R. 592; [1952] 2 Q.B. 41; 116 J.P. 161.** Counsel for the respondent said that, as this was a criminal case, we were at liberty to disregard the decision of the Court of Appeal in **Burgess v. Jarvis [1952] 1 All E.R. 592; [1952] 2 Q.B. 41; 116 J.P. 161.** but I should be sorry to disregard a decision of the Court of Appeal merely because we are sitting on an appeal from justices and the Court of Appeal were sitting on an appeal from a judge in chambers in a civil proceeding. Moreover, not only should I not feel at liberty to do so, but this section can only be construed in one way – that a notice must contain two dates, i.e., the date

> when the notice is to take effect (which must be not less than twenty-eight days from the service) and the time within which the work is to be done from the date on which the notice takes effect."

Lord Goddard further states on the same page:

> "...Section 23 (4) gives certain rights of appeal against a notice, which means a valid notice and not one not complying with the Act. It provides:
>
> '... and on any such appeal the court – (a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly...'
>
> That is what can be contended on an appeal against a notice. The recipient can say: 'This notice never ought to have been served on me because I had received, or did not require, permission', or: 'I have carried out the conditions subject to which permission was granted', or: 'This notice exceeds what is reasonable for me to be called on to do'. The sub-section does not provide for an appeal against the notice on the ground that it is a bad notice because that involves, not an appeal against the notice, but a contention that the recipient never had a notice served on him at all, which is what the appellant contends in this case." [Emphasis supplied]

This last point was also taken in the recent judgment of **Veron Simpson v. The Town and Country Local Planning Authority of the K.S.A.C.** (S.C.C.A. No. 28/99) delivered June 25, 2001. Simpson challenged the validity of the

enforcement notice before the Tribunal and failed. Thereafter he renewed his challenge before this Court and was successful.

Turning to the notice in issue it reads at paragraphs 6& 7 thus:

> "6. If you fail to take the steps required by this Notice to be taken (other than the discontinuance of any use of the land) the local planning authority may enter on the land and take those steps and may file suit in a Resident Magistrate's Court, for the recovery of any expenses reasonably incurred by them in that behalf.
>
> 7. TAKE NOTICE THAT IF YOU FAIL to comply with this Notice you are liable to prosecution and penalty as follows:
>
> (a) On a first conviction, to a fine not exceeding $25,000 or in default of payment to imprisonment with hard labour for a term not exceeding 12 months;
>
> (b) On a second conviction to a fine not exceeding $5,000 for every day on which the contravention continues after the first conviction or, in default of payment, an order shall be made by the Court for the interest in the land to be forfeited to the Crown;
>
> (c) On any subsequent conviction your interest in the land shall be forfeited to the Crown."

The above paragraphs were permissible because sec. 24(1) and (2) of the Act reads:

> "24.-(1) If within the period specified in an enforcement notice, or within such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps, and may recover as a simple contract debt in the Resident Magistrate's Court of the parish in which the land is situated, from the person who is then the owner of the land, any expenses reasonably incurred by them in that behalf; and if that person, having been entitled to appeal to the Tribunal under section 23A, failed to make such

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

So the Local Planning Authority could also enter the land and recover expenses and carry out the demolition or other work necessary to restore the land to its original condition pursuant to sec. 24(1) of the Act. This is covered by paragraph 6 of the notice at page 60 of the record which reads:

> "6. If you fail to take the steps required by this Notice to be taken (other than the discontinuance of any use of the land) the local planning authority may enter on the land and take those steps and may file suit in a Resident Magistrate's Court, for the recovery of any expenses reasonably incurred by them in that behalf."

So the decision on the validity of the enforcement notice is of vital importance to Auburn Court because if the notice was valid the Crown could use it as the basis of instituting criminal proceedings as in **Mead v. Plummer** (supra) or an enforcement action as in **Burgess v. Jarvis** (supra). Here is how Denning LJ. In the latter case pronounced on the invalid notice relied on as a defence. His Lordship put the issue thus at page 596:

> "...The question is whether the present notice satisfied the requirements of the Act."

Then the answer was as follows on the same page:

> "...Looking at the wording of the notice, it is clear that it took effect at some time before the expiration of five years, because the owner was required to act within that time. If the notice takes effect before the end of five years, when does it take effect? The only possible date is the date on which it is served, because, unless it took effect then, the owner would not have the benefit of the full five years allowed to him to do the work. The result is, therefore, that this notice took effect at once. It did not allow the occupier the minimum of twenty-eight days before it took effect. It ought to have specified from which date it took effect, and that period should be a minimum of twenty-eight days after service of the notice. It did not specify any period. It was, therefore, invalid."

As for the criminal sanction, sec. 24(3) of the Act is applicable. It reads:

> "(3) Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under Part III, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding twenty-five thousand dollars, or in default of payment to imprisonment with hard labour for a term not exceeding twelve months, and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars for every day on which the use is so continued, or in default of payment the Resident Magistrate shall make an order for the interest in the land to be forfeited to the Crown, and if the use is continued after the second conviction, he shall be guilty of a further offence and on summary conviction before a Resident magistrate the interest in the land shall be forfeited to the Crown."

If the notice fails to comply with the provisions of the Act as this one does, then the drastic civil and criminal sanctions could not be enforced. There are constitutional implications also as the provisions in sec. 24 of the Act are permissible by virtue of sec. 18 of the Constitution which only permits compulsory acquisition of property if there is compensation. One exception is sec. 18(2)(b) which reads:

> "(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;"

The court will not countenance interference with rights of property which is a fundamental right unless there is compliance with the provisions of the Act. **Godstone Rural District Council v. Brazil** (1953) 2 All E.R. 763 was also cited in this context by Mr. Francis for the appellant. Parker J. as he then was said at page 765:

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

The principle that a statutory Authority must comply with the provisions of the Act is also applicable to an irregularity notice issued pursuant to the Building Act.

Another aspect to note was the failure to comply with the provision of section 23(2A) of the Act. It reads:

> "(2A) Where a local planning authority, the Government Town Planner or the Authority serves an enforcement notice under subsection (1), the local planning authority, the Government Town Planner or the Authority, as the case may be, shall cause a copy of the enforcement notice –
>
> (a) to be posted in a conspicuous place on the development or on the land where the development is being carried on; and
>
> (b)to be published in a daily newspaper printed and circulating in Jamaica."

There is no indication that the Deputy Surveyor or any other posted the enforcement notice on the site or carried the publication of this enforcement notice in a newspaper printed and circulated in Jamaica. The only evidence on service of the enforcement notice comes from the Deputy Surveyor at page 75 of the record at paragraph 27. It reads:

> "27. That the Enforcement Notice was served on one Ralph McPherson at 15 South Avenue on the 29th April, 1996"

There was a failure to comply with the other mandatory provisions of the Act as explained earlier.

The appellant filed a notice of appeal to the Tribunal but discontinued proceedings. It is helpful to set out paragraph 5 of the Notice in order to address that issue. It reads:

"5. If you are aggrieved by this Notice you may (pursuant to section 23A of the Act) appeal against the Notice to the Appeal tribunal within 28 days of service of this Notice.

(a) All building, engineering or mining operations on the land shall cease, and

(b) paragraphs 2, 3, 4 and 6 of this notice shall not take effect until the appeal is finally determined."

The relevant statutory provision at section 23A reads as follows:

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

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

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

Then the powers of the Tribunal are stated thus:

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

(a) quash the notice if satisfied that permission was granted under this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with; or

(b) vary the notice if not so satisfied but satisfied that the requirements of the notice exceed what is necessary for restoring the land to its condition before the development took place,

> or for securing compliance with the conditions, as the case may be; or
>
> (c) in any other case, dismiss the appeal:
>
> Provided that where the enforcement notice is varied or the appeal is dismissed, the Tribunal may, if it thinks fit, direct that the enforcement notice shall not take effect until such date (not being later than twenty-eight days from the determination of the appeal) as the Tribunal may specify.
>
> (5) A person who is aggrieved by a decision of the Tribunal may appeal against that decision to the Court of Appeal."

The Tribunal is empowered to regulate its own procedures. See paragraph 7(4) of the Fourth Schedule to the Act. No doubt it would permit cross-examination and oral evidence where necessary. To my mind it would have been appropriate to have continued the appeal before the Tribunal, so that the issues of fact would be more readily resolved. In any event there could be recourse to this court by virtue of section 23A(5).

The only other paragraph in the notice is the first which reads:

> "TO: Auburn Court Limited.,
> OF: 15 South Avenue,
> Kingston 10.
> 1. WHEREAS you have contravened or caused a contravention of the Town and Country(Planning) Confirmed Development Order, 1966,
>
> (a) by the following development, that is to say
> Building
> ---
> (specify development)
> ---
> at 15 South Avenue, Kgn. 10.
> (state full address of place where development is being carried out)"

That paragraph complied with that portion of section 23(2) which reads:

> "(2) Any notice served under this section (hereinafter called an ""enforcement notice") shall specify the development which is alleged to have been carried out without the grant of permission as aforesaid, or as the case may be the matter in respect of which it is alleged that any such condition as aforesaid have not been complied with, ..."

On this analysis the enforcement notice is null and void because of the failure to specify the period in paragraph 4, the period within which to restore the land to its original condition.

At this point it is appropriate to state the relief sought below and the corresponding ground of appeal. The relief sought reads:

> "(iv) the said notices of decision and/or enforcement are defective, irregular and invalid in that they are not signed by any person or authority empowered by law to issue the said notices and were not issued within the time or in the manner prescribed by law."

By referring to notices above I take this to cover all three notices since the motions were consolidated. The relevant ground of appeal reads:

> "...The Enforcement Notice showed a procedural impropriety and irrationality."

Once it has been decided that the enforcement notice issued by the Local Planning Authority was invalid then that portion of the letter of refusal by the K.S.,A.C. pertaining to the refusal pursuant to the Town & Country Planning Act must also be quashed. In any event as was explained earlier there is a special tribunal under the Act to deal with enforcement notices and thereafter there is a right of appeal to this Court. Therefore, the K.S.A.C. was not authorized to make a decision under the Act.

What is the status of the irregularity notice at page 88 of the record issued 30th May, 1996 by the Building Surveyor of the K.S.A.C?

The "Irregularity" Notice reads as follows at page 88 of the record:

> "KINGSTON AND ST. ANDREW CORPORATION BUILDING AUTHORITY
>
> NOTICE DUE TO IRREGULARITY
>
> KINGSTON AND ST. ANDREW CORPORATION BUILDING ACT SECTION 39)
>
> Delbert Perrier,
> Managing Director
> TO: Auburn Court Limited
> 15 South Avenue
> Kingston 10
>
> NOTICE – that you are hereby required within (48) Forty Eight hours of service to pull down the Building being constructed by you from c.c. as reinforced c.c. columns, c.c. beams and c.c. slab consisting of 3,600.0 sq. ft. approx. and situate at South Avenue, Rest Pen and which does not conform with the Building Act Vol. 10 Revised laws of Jamaica.
>
> .....
> .....
> Failure to comply with
> this Notice will render you liable to prosecution under the Kingston and St. Andrew Corporation Building Act.
>
> This 30th day of May, 1996
> A White
> For Building Surveyor"

A statutory notice generally implies that a hearing will be provided for in the statute. So it is now necessary to examine the relevant provisions of the Building Act to see firstly what are the requirements to be incorporated in a valid notice, and secondly, to see what provisions were made for a hearing. Sec. 38 of the Building Act reads:

> "38. In the following cases, that is to say –

> If in erecting any building, or in doing any work to In or upon any building, anything is done contrary to any of the rules or regulations under this Act, or anything required by this Act is omitted to be done, or
>
> In cases where due notice has not been given, if the Surveyor, on surveying or inspecting any building or work, finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the rules or regulations under this Act, or whether anything required by the regulations under this Act has been omitted to be done,
>
> in every such case the Surveyor shall give to the builder engaged in erecting such building, or in doing such work, notice in writing requiring such builder, within forty-eight hours from the date of such notice, to cause anything done contrary to the rules or regulations under this Act to be amended, or to do anything required to be done by this Act but which has been omitted to be done, or to cause so much of any building or work as prevents such Surveyor from ascertaining whether anything has been done or omitted to be done as aforesaid to be to a sufficient extent cut into, laid open or pulled down."

So for the first part, the notice must state that due notice was not given to the Surveyor and the date the Surveyor carried out his inspection. The notice must also contain what was done contrary to the rules or regulations under the Act or if any thing required by the Building Act was omitted. Further, section 76 is closely connected with section 38. It expressly requires the Surveyor to state when he discovered the building was being erected. If there was no such restriction the Surveyor could issue an irregularity notice at any time. These provisions are obligatory and it was not sufficient to ignore these particulars in the notice. The omission of these particulars made the notice of irregularity void.

Parker's J. statement of principle in **Godstone** (supra) regarding enforcement notices is also applicable to an irregularity notice.

Section 39 of the Building Act which provides for a hearing shows the necessary judicial intervention. It reads:

> "39. If the builder to whom such notice is given makes default in complying with the requisition thereof within such period of forty-eight hours, the Surveyor may cause complaint of such non-compliance to be made before a Justice, and such Justice shall thereupon issue a summons requiring the builder so in default to appear before him, and if upon his appearance, or in his absence upon due proof of the service of such summons, it appears to such Justice that the requisitions made by such notice or any of them are authorized by this Act, he shall make an order on such builder commanding him to comply with the requisition of such notice, or any of such requisitions that may in his opinion be authorized by this Act, within a time to be named in such order." (Emphasis supplied)

Here is where section 76 of the Building Act which was cited in the Court below and section 16 of the Justices of the Peace Jurisdiction come into play. Section 76 of the Building Act reads:

> "76. In cases where any building has been erected or work done without due notice being given to the Surveyor, the Surveyor may, at any time within one month after he has discovered that such building has been erected or work done, enter the premises for the purpose of seeing that the regulations of this Act have been complied with; and the time during which the Surveyor may take any proceeding, or do anything authorized or required by this Act to be done by him in respect of such building or work, shall begin to run from the date of his discovering that such building has been erected or work done."(Emphasis supplied)

Then section 10 of the Justices of the Peace Jurisdiction Act reads:

> "10. In all cases where no time is already, or shall hereafter be, specially limited for making any such complaint or laying any such information, in the enactment or enactments of this Island relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose;
>
> Provided that nothing in this section shall be deemed to apply to any case triable by a Resident Magistrate in the exercise of his special statutory summary jurisdiction."

After citing sec. 76 of the Building Act the judgment of the Court below ran thus at page 121 of the record:

> "Section 2 of the Act defines "builder" as –
>
> > 'the person who is employed to build or to execute work on a building or structure or, where no person is so employed, the owner of the building or structure.'
>
> Dr. Barnett submitted that in respect of this notice it is defective in the following respects:
>
> (a) Arnold White the Deputy Building Surveyor knew of the erection of the building from February 1996 and therefore, in accordance with section 76 steps had to be taken by the surveyor within one month thereof.
>
> (b) Notice was issued on May 31, 1996, to Delbert Perrier, Managing Director of Auburn Court Ltd. and not to the builder or owner.
>
> (c) The notice did not specify the reasons for the decision"

Then for easy reference the findings of the Court below on the notice are as follows(seen at pages 122-123 of the record):

> "It must be conceded that the irregularity notice dated May 30, 1996, did not particularize the reasons for the notice. It merely stated that the building

> 'does not conform with the Building Act, Volume 10, revised Laws of Jamaica.
>
> However, this is a case in which the building was being erected without permission and even after service of the notice the work continued. The applicant showed a blatant disregard for the rule of law. Although the notice did not specifically set out the reasons the applicant well knew from the site discussions which he had with the officers of the authoriised agencies the reason for the issuance of the notice."

It is open to this Court to take a different view of the defects in the irregularity notice. It is necessary for this notice to be valid before it can be resorted to in an enforcement action before a Justice in Petty Sessions and thereafter to the Resident Magistrate in his Court - (See sec. 39 and 40 of the Building Act). The Deputy Surveyor states in paragraph 15 of his affidavit at page 73 of the record:

> "15. That on March 25, 1996, I along with Mr. Whittaker, Chief Traffic Engineer, Mr. Colin Husbands and Mr. Perrier met on the site of 15 South Avenue."

So the latest date for issue of the notice would have been 24th April. The irregularity notice was not issued until 30th May 1996. Here is the affidavit of the Deputy Surveyor at page 75 of the record:

> "28. That in light of the fact that no building permission had been granted, no site inspection carried out and the plans submitted by Auburn Court Limited for building permission had not yet been considered for approval, on the 5th June, 1996 a Notice due to Irregularity pursuant to section 38 of the Building Act, signed by me and dated May 30, 1996 was served on Delbert Perrier requiring that the building being constructed be pulled down within 48 hours due to its non-conformity with the Building Act. There is now produced and shown to me marked "AW3" for identification a copy of that Notice."

On the basis of the above analysis the notice of irregularity is invalid.

Where there has been a valid notice section 40 provides for the penalties and the drastic remedial action by the Surveyor. The section reads thus:

> "40. If such order is not complied with, the builder on whom it is made shall incur a penalty not exceeding forty dollars a day during every day of the continuance of such non-compliance, and in addition thereto the Surveyor may, if he thinks fit, proceed with a sufficient number of work-men to enter upon the premises, and do all such things as may be necessary for enforcing the requisitions of such notice, and for bringing any building or work into conformity with the rules of this Act; and all expenses incurred by him in so doing, and in any such proceedings as aforesaid, may be recovered from the builder on whom such order was made, or from the owner of the premises, by plaint in the Resident Magistrate's Court for Kingston at the instance of the Surveyor, or if the owner cannot be found, or is under disability, or if on demand he refuses or neglects to pay the aforesaid expenses, then the Surveyor, with the concurrence of the Corporation, and under a resolution of the Corporation shall have the same power of taking and selling the building in respect of which the order is made, and applying the proceeds, as is hereby given to the Corporation in the case of dangerous structures."

It must be noted that the forum is the Resident Magistrates Court exercising a civil jurisdiction. Equally it must be emphasised that before the jurisdiction of the Resident Magistrate is invoked there must be a prior proceeding before a Justice in Petty Sessions pursuant to section 39 of the Building Act. Section 43 of this Act reads:

> "43. The Corporation may from time to time prepare or sanction forms of various notices required by this Act, and may from time to time make alterations therein as they may deem requisite, and any notice made in a form sanctioned by the

> Corporation shall in all proceedings be held sufficient in law."

This section does not cut down on the requisitions to be incorporated in the notice pursuant to section 38. On the above analysis I would reiterate that the notice due to irregularity is null and void.

Was the enforcement notice issued by the Town Planner on 22nd August, 1996 void?

The specific references in the judgment below to the enforcement notice issued on August 22, 1996 by the Town Planner are as follows. At page 106 of the record it reads:

> "A notice dated August 22, 1996 was served on the applicant on or about August 22, 1996, requiring inter alia, the demolition of the building which was constructed at a cost of $10,000,000.00.
>
> The applicant appealed against the notice dated August 22, 1996, as well as against the notice dated May 30, 1996."

Then at page 114 of the record the judgment reads:

> "The Enforcement Notice issued pursuant to section 23 of the Town and Country Planning Act, states categorically that the erection of the building at 15 South Avenue was without permission."

Further on page 123 of the record it reads:

> "That paragraph 5 of the notice does not conform with the prescribed form of notification does not in my view invalidate the notice. The omission goes to mere form. No prejudice has been occasioned to the applicant."

I think the Court below was referring to paragraph 4 of the notice, but paragraph 5 was also defective.

I cited these passages to demonstrate that the validity of the enforcement notice was an issue in the Court below. However, section 23 of the Act although specifically mentioned, was never analysed. Of equal importance was the omission to examine the principle that the failure of the enforcement notice to comply with the mandatory provisions of sec. 23 of the Act required the Court to declare the notice invalid. Had the Court below examined the principle once it found paragraph 4 was not in conformity to the statute, it would have found the notice invalid.

I will now attempt to repeat a short analysis of the cases directly concerned with that section. If on the face of the notice it is ascertained that there was a failure to comply with the provisions of the Act, then it is open to this Court to pronounce such a notice null and void. That is the principle of law which has been expounded either expressly or by necessary implication in **Burgess v Jervis** [1952] 1 All E.R. 592, **Mead v. Plumtree** [1952] 2 All E.R. 723, **Godstone Rural District Council v. Brazil** [1953] 2 All E.R. 763, when taking into account sec. 23(2) of the Town and Country Planning Act of the United Kingdom. The principle has been approved of in **Regina v Wicks** [1997] 2 W.L.R. 876 in the House of Lords. It is against this background that it must be found that the enforcement notice issued by the Town Planner on 22nd August, 1996, was also null and void.

It is useful to advert to the evidence of Blossom Samuels, the Government Town Planner in which she relates how she came to issue the notice. Here are the relevant parts of her evidence at pages 55-57 of the record:

> "3. That in February, 1996, I became aware of a building being erected on 15 South Avenue

4. That on seeing the building I was concerned about the closeness of the building to the roadway as one wall was an extension to the existing southern perimeter wall of the premises.

5. That on investigating I discovered that an application for building and planning permission for those premises had been made to the Kingston and Saint Andrew Corporation (hereinafter referred to as the "KSAC") on or about the 4th March, 1996.

6. That construction of the building continued on 15 South Avenue before any permission was granted by the KSAC and in my knowledge an Enforcement Notice pursuant to section 23 of the Town and Country Planning Act (hereinafter referred to as "the Planning Act") was served by the KSAC on 15 South Avenue on the 29th April, 1996.

7. That this Notice required that he discontinue use of the land, and stated that Auburn Court Limited was prohibited from carrying out any development on the land. There is now produced and shown to me marked "B.S.1" a copy of that Notice."

Then comes a crucial part of her evidence relating to the site inspection.

"8. That on the 6th August, 1996 a site inspection of the premises was undertaken and revealed:

A new two (2) storey building of reinforced concrete framing and pre-cast blocks located along the southern boundary of the premises. The external wall of the building as seen from South Avenue was vertically in line with the existing boundary wall. This wall was essentially blank rising to a height of approximately 25 feet or 7.62 meters. The structure was essentially completed. Window frames were not yet in position. The ground floor consisted of 64 compartments. The first floor was rectangular space, the roof of which was metal sheeting on light lattice trusses. The building was already rendered and partially painted."

She continued thus:

> "9. I ascertained from the KSAC at a meeting held on August 7, 1996 that the application of Auburn Court Limited for the erection of a single storey (ground floor only) building had been refused by the KSAC.
>
> 10. In the full knowledge of the KSAC I served another Enforcement Notice dealing with the construction of the illegal building and the steps to be taken to remedy the breach pursuant to section 23 of the Town and Country Planning Act.
>
> 11. The Enforcement Notice was dated August 22, 1996, was signed by me, was served personally on Mr. Delbert Perrier on site, another of the said notices was affixed to the Building to which the Notice related and the Notice was published in the Gleaner newspaper on the 30th August, 1996. There is now produced and shown to me marked "BS 2A" a copy of the Enforcement Notice and as "BS 2B" a copy of the Notice as advertised in the Gleaner newspaper."

It is now appropriate to examine the notice against sec. 23 of the Act, to ascertain if on its face its invalidity is revealed.

Paragraph 4 of the Notice reads:

> "4. THIS NOTICE TAKES EFFECT, subject to paragraph 5 at the expiration of three (3) days after the date of service."

This clause in the notice is not in conformity with section 23(3) of the statute which reads:

> "(3) Subject to section 23A an enforcement notice shall take effect -
>
> (a) in the case of the discontinuance of use of land, at the expiration of twenty-eight days after the service thereof;
>
> (b) in any other case, at the expiration of three days after the service thereof;

> Provided that where an appeal is lodged pursuant to section 23A any building, engineering or mining operations on the land shall cease and the enforcement notice shall not take effect pending the final determination of the appeal."

Further paragraph 2 of the enforcement notice reads:

> "prohibition regarding use of land contra-vening of conditions. 2. You are prohibited from – continuing or carrying out any development or operation or using the land in respect of which this notice is issued"(Emphasis supplied

The Town Planner had no authority to set the period within which the notice takes effect to be at the expiration of 3 days from the date of service in the light of paragraph (a) of sub-section (3) of the section set out above. It is clear that sec. 23(3)(a) refers to land in the classic sense in which it has always been treated in the law of real property. This is evidenced by the mention of "any building, engineering and mining operations on the land" in the proviso to sec. 23 (3)(a). Section 23(3)(b) refers to a caravan, a house on wheels, a tent, a chattel house (a board house whose foundation is wooden blocks), a marquee, and such other structures that were never included in the definition of land in the law of real property. It is for those structures that the notice is suspended within 3 days of service.

The necessity to include the proper information in the notice is no mere formality. It is a necessary ingredient. The statutory period of twenty-eight days must be stated in the notice.

Paragraph 5 of the Town Planner's notice is also defective. It reads:

> "5. If you are aggrieved by this notice you may (pursuant to Section 23A of the Act) appeal

> against the Notice to the Appeal Tribunal within 28 days of service of this Notice."

This clause failed to bring home to Delbert Perrier and Auburn Court Ltd. that if there was an appeal pursuant to section 23A of the Act that:

> "(a) all building engineering or mining operations on the land should cease
>
> (b) paragraphs 2, 3 and 4 (if properly worded)and 6 shall not take effect until the appeal is finally determined."

This is the second and equally fundamental defect in the enforcement notice of the Town Planner.

Although there is a statutory right to appeal from an enforcement notice, Auburn Court resorted to judicial review which is enshrined in section 1(9) of the Constitution which reads:

> "(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

It seems a more expensive route but the appellant had a choice. In the judicial review proceedings in the Court below it was appropriate to demonstrate the importance of the statutory basis on which the notice takes effect. In this case it is necessary to examine paragraph 3 of the notice which reads:

> "3. YOU ARE HEREBY REQUIRED to take the following steps –

i) to cease construction of the building immediately from the date on which this notice takes effect:

ii) to demolish the building being constructed within 7 days from the date on which this notice takes effect.

iii) To remove from the land all building materials and rubble resulting from the demolition of the building within 10 days from the date on which this notice takes effect.

iv) To restore the land to its condition before the breach of erecting the building without permission within 14 days from the date on which this notice takes effect."

All the above provisions in the notice are dependent on the validity clause 4. However, clause 4 is invalid on its face as the notice takes effect within 3 days instead of 28 days.

Clause 6 and 7 of the notice enables the Town Planner to point to the coercive powers accorded by sec. 24 (3) of the Act (supra). These clauses read as follows:

"Entry on land by local planing authority

6. If you fail to take the steps required by this Notice to be taken (other than the discontinuance of any use of the land) the local planning authority may enter on the land and take those steps and may file suit in a Resident Magistrate's Court, for the recovery of any expenses reasonably incurred by them in that behalf.

Penalty for failure to comply with this Notice

7. TAKE NOTICE THAT IF YOU FAIL to comply with this Notice you are liable to prosecution and penalty as follows-

(a) on a first conviction to a fine not exceeding $25,000 or in default of payment to imprisonment with hard

labour for a term not exceeding 12 months

b) on a second conviction to a fine not exceeding $5,000 for every day on which the contravention continues after the first conviction or, in default of payment, an order shall be made by the Court for the interest in the land to be forfeited to the Crown;

(c) on any subsequent conviction your interest in the land shall be forfeited to the Crown."

Clauses of the enforcement notice refer to the development without permission referred to in sec. 23 (2)of the Act. This clause reads:

"Nature contra-vention

1. WHEREAS you have contravened or caused a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966

by erecting without permission on the land known as 15 South Avenue registered at Vol. 1127 Folio 105 of the Register Book of Titles, a building comprising ground floor plus one, using the existing southern perimeter wall and extending it upwards to form the southern wall of the said building in approximately the position marked X on the plan attached."

If however this notice is invalid as I have found because the mandatory conditions in clauses 4 and 5 have not been stated, then the appellant is entitled to have it quashed.

(Part II)

Matters pertaining to the merits raised on appeal and in the Court below

(i) The application to adduce fresh evidence

(ii) The issue of natural justice

(iii) The provisions for a hearing provided for in section 10 of the Kingston and St. Andrew Building Act.

(iv) Whether an order for Prohibition was necessary in the circumstances of this case

(v) The complaint about Confirmed Development Order 1966 which was said not to exist.

As to (i)
The application to adduce further evidence

In the light of my analysis of the law, both the enforcement notices and the irregularity notice are invalid. It is therefore not strictly necessary to deal with all matters raised on appeal or determined in the Court below. However, out of respect to the submissions of counsel on both sides, I will deal shortly with the above issues. With respect to this issue raised at the beginning of the appeal we promised to give a ruling. Why was there an application to adduce further evidence in this case?

It is being alleged that Mr. Arnold White, the Deputy Building Surveyor of the K.S.A.C., at a meeting on the site on 25th March 1996, gave an assurance that the unauthorized improvement in issue was approved and would be confirmed in writing. He certainly had the power pursuant to sec. 10 of the Building Act to approve the plans and "notify his approval in writing to the builder" which suggests that oral assurances are permissible if confirmed in writing. Here is the letter from Mr. Lorn Whittaker, the Chief Traffic Engineer in the Ministry of Local Government and Works to Mr. Berthan Macaulay Q.C. which tells the story:

"15th March 1999

Berthan Macaulay QC
Barrister and Attorney-at-Law
Legal Consultant
18A Duke Street
Kington

Dear Sir

Letter from the Kingston & St. Andrew Corporation –
About the Approval for 15 South Avenue, Kingston

This serves to confirm that there was a meeting at the site, 15 South Avenue, Kingston 10 on the 25th March 1996.

The attendees were:

Messrs: Husbands
Perrier
White; and
Whittaker

Based on the meeting I was told by Mr. White from the Kingston & St. Andrew Corporation that the improvement was approved and this confirmation would have been done in writing and subsequently sent to me, the then Chief Traffic Engineer.

I am

Lorn Whittaker
Planning Engineer
Directorate of Policy Planning
And Evaluation."

Here are the relevant paragraphs of the affidavit dated the 9th March, 2000, of Mr. Delbert Perrier, the Managing Director of Auburn Court ,on the issue:

"3. That on Friday the 26th day of February, 1999, I accompanied Mr. Berthan Macaulay of Queens Counsel to the offices of the Ministry of Local Government and Works at No. 1C Pawsey Avenue, Kingston 5, in the parish of Saint Andrew.

> 4. That I had with me a photocopy of a letter which came to me anonymously written by Mr. Lorne Whittaker, Chief Traffic Engineer and addressed to The Attorney General, 79 Barry Street, Kingston, and dated the 12th day of May, 1997,and which I had already exhibited to my affidavit sworn on the 18th day of February, 1999, in support of my application to admit fresh evidence.
>
> 5. That in the presence and hearing of Mr. Macaulay I showed Mr. Whittaker the photocopy of the letter which I had in my possession and asked him if he recognized his signature on it. Mr. Macaulay also asked him the same question.
>
> 6. That he took the letter from me and read it. He acknowledged to both Mr. Macaulay and myself that it was his letter, that he wrote it and that the signature on the letter was his."

He then continued thus:

> "7. That a photocopy of the said letter is now produced and shown to me and marked Exhibit "D.R.P.-1".
>
> 8. That he further told Mr. Macaulay and myself that the contents of the last paragraph of the letter are true. In fact the same thing has been told to me by Mr. Arnold White the Building Surveyor who was at the time Acting City Engineer, as deponed in paragraph four (4) of my affidavit in support of my application for certiorari sworn on the 13th day of May, 1997."

Here is the letter which Mr. Perrier stated in paragraph 4 of his affidavit came to him anonymously:

> "MINISTRY OF LOCAL GOVERNMENT AND WORKS
> 140 MAXFIELD AVENUE
> KINGSTON 10
> JAMAICA
> May 12, 1997
>
> The Attorney General
> 79 Barry Street
> Kingston

Dear Sir:

Re: The Affidavit of Lorn Whittaker
Suit 102 0f 1996, in the matter of Section 23
of the Town and Country Planning Act
and
in the matter of 15 South Avenue registered at
Volume 1127, Folio 105 of Registered Book of
Titles

I acknowledge the receipt of the affidavit as captioned above. I, however, would like to bring to your attention the following corrections which have to be made:-

i. "Item 9" ... the set-back stated by Mr. White was 5 feet and not 5 feet per storey which was done by every premises from Merrick Avenue as he had furnished a title on site to this effect.

ii. "Item 12" ... showed that what was required was the removal of the existing sidewalks to create an extra storage lane for traffic proceeding onto Waterloo Road

iii. "Item 13"... The letter dated February 26 was sent to the KSAC which mistakenly referred to Mr. Perry instead of Perrier and 15 Waterloo Road instead of 15 South Avenue, was sent to determine if any Building Permit was issued by the KSAC and efforts by Mr. Gutierrez and myself, have still not yielded any reply to this request to date from the KSAC.

Based on Mr. White's verbal acknowledgement that the building plans were approved and a promise was made by him to send an official reply to the Ministry, Mr. Gutierrez went to Mr. White's office only to be told that a reply could not be given to the Ministry because we, the Ministry had written about the wrong person, i.e. Mr. Perry, and the wrong address, i.e. 15 Waterloo Road.

I apologize for the delay in the response but I have to resubmit the 6 copies of the Affidavit.

Thank you

I am,
Lorn L. Whittaker
Chief Traffic Engineer
for Permanent Secretary
c.c. J.U. Hibbert"

Stamped:
Directorate of Technical
Services – Min.of Local
Govt. & Works

The date of this letter is important. The affidavit of Lorn Whittaker sworn to before a Justice of the Peace was on 12th May 1997. So the inference is that after he signed and swore to his initial affidavit, he wrote to the Attorney-General, pointing out the need for corrections. The paragraph pertaining to the verbal acknowledgement that the building plans were approved was not included in the affidavit in the record. It is a curious omission. Be it noted the refusal by the K.S.A.C. to approve the plans submitted to it by Auburn Court was on 1st July, 1996.

It is now pertinent to turn to the affidavit of Arnold White the Deputy Building Surveyor of the K.S.A.C. It reads in part at page 73 of the record as follows:

> "7. That I have read the Affidavits of Delbert Perrier and Colin Husbands both sworn to on the 6th November, 1996.
>
> 8. That I refer to the Affidavit of Lorn Whittaker sworn to on the March, 1997."

So it seems the affidavit of Lorn Whittaker of 12th May, 1997 exhibited was the partially corrected affidavit.

> "9. That on the 26th February, 1996 Lorn Whittaker the Chief Traffic Engineer of the Ministry of Local Government and Works sent a letter to the KSAC enquiring whether building permission had been granted to the owner of 15 South Avenue, and indicating that there were plans for road improvement by the widening of South Avenue and Waterloo Road with which the building under construction would conflict."

Then he continued thus:

> "14. That as Deputy Surveyor it is part of my duties to inspect premises for various purposes and to give evidence to the KSAC in its deliberations.
>
> 15. That on March 25, 1996, I along with Mr. Whittaker, Chief Traffic Engineer, Mr. Colin Husbands and Mr. Perrier met on the site of 15 South Avenue."

Then at paragraph 19 of his affidavit he stated:

> "19. That on the 25th March, 1996 at the site I advised Mr. Perrier to cease work on the building as his application for building/planning permission had not yet been processed or considered."

Be it noted that the application by Auburn Court prepared by Mr. White was with the K.S.A.C. on March 4, 1996. It was not part of his statutory duty to complete application forms for Auburn Court. He had important statutory duties regarding approval of plans, or to call for amendment of those plans. He also had the duty to inform the builder in writing if plans were approved and to refer disputes to the Building Authority. These duties were not indicated in his affidavit. Then he continues in his affidavit thus:

> "20. That at no time on that date or any other date did I tell Mr. Perrier or Mr. Husbands that the plans submitted would be approved or were certain to be approved pursuant to the Building Act or the Town and Country Planning Act."

Here is how the affidavit evidence of Mr. Delbert Perrier emerged on this issue at page 16 of the record:

> "2. That a copy of the affidavit of Mr. Arnold White, Deputy Building Surveyor of The Kingston and Saint Andrew Corporation sworn on the 10th day of March, 1997 has been produced and shown to me, and particularly paragraphs 19 and 20 thereof.

> 3. That it is not true that at the site meeting on the 25th day of March, 1996, Mr. White advised me to cease work on the building as my application for building planning permission had not yet been processed or considered.
>
> 4. That it is true that Mr. White told me at the site meeting on the said 25th day of March, 1996 that the plans submitted for the building were approved."

Mr. Collin Husbands is an important witness. He holds a B.Sc. in Civil Engineering from London University and is a member of the Institute of Engineers of Jamaica. He has been a consultant engineer to Auburn Court and Mr. Delbert Perrier since 1964. Here is the relevant part of his evidence at page 50 of the record:

> "5. I had discussions with the City Engineer, Mr. Gabay (now deceased) and Mr. A. Whyte the Chief Building Inspector of the Kingston and Saint Andrew Corporation, Mr. Delbert Perrier Managing Director of Auburn Court Limited was present at one of these meetings.
>
> 6. I designed and prepared detail working drawings of a two storey building to be constructed at premises No. 15 South Avenue, Kingston 10, aforesaid.
>
> 7. At the meeting at which Mr. Perrier was present, we also examined the sub-division Plan and demonstrated to Mr. Gabay and Mr. Whyte who consulted Mr. Grant, Chief Surveyor of The Kingston and Saint Andrew Corporation. He confirmed that the building was not being constructed on the boundary, but that there was "set back" between the boundary and the longitudinal face of the building parallel to South Avenue. Mr. Whyte confirmed that this was so and that there was no objection to the proposed development."

As to the crucial site meeting on 25th March 1996 here is his account at page 51 of the record:

> "8. At a meeting held on the site on 25th March, 1996 attended by Mr. Whyte, then Acting City Engineer, Mr. L. L. Whittaker, Chief Traffic Engineer Ministry of Local Government and Works and Mr. Perrier.
>
> 9. The meeting was called as the result of a letter written by Mr. Whittaker/Mr. Gabay dated the 26th February, 1996, enquiring whether a building permit had been issued for the building and raising questions as to the possible impact of the building on proposals for the widening of South Avenue. I exhibit hereto a copy of the said letter marked with the letters "C.H.-1".
>
> 10. At the meeting Mr. Whyte pointed out to Mr. Whittaker that there was a "set-back" from the Lot boundary to the longitudinal side of the building of approximately two feet six inches (2'x6") and stated that the Plans had accordingly been approved and were being processed for collection.
>
> 11. In response to Mr. Whittaker's request Mr. Whyte also promised to confirm this in writing. It was agreed that I should collect the letter the following day at 2:00 p.m.
>
> 12. On the following day I attended at Mr. Whyte's Office at the Kingston and St. Andrew Corporation as agreed. Mr. Whyte said as there was a discrepancy in Mr. Whittaker's letter which referred to Parcel No. 15 Waterloo Road and not No. 15 South Avenue he was unable to give me the letter; although I pointed out to him that the property in question had been identified at the site meeting as No. 15 South Avenue, and that all the parties present at the meeting so understood it.
>
> 13. In its structure and formation the building complies in all aspects with the Kingston and Saint Andrew Building Act and Regulations."

It is now pertinent to examine the affidavit evidence of Lorn Whittaker, the Chief Traffic Engineer at the Ministry of Local Government and Works. He stated that he had read the affidavit evidence of Delbert Perrier and Colin Husbands. Then as to the details of paragraphs 5 to 10 of his affidavit at pages 92 – 93 of the record they are here reproduced:

> "5. That I was aware that as of June, 1988 there was a proposal for road improvement by the widening of South Avenue and Waterloo Road and I was concerned that the development at 15 South Avenue would conflict with that proposal. There is now produced and shown to me marked "LW 1" for identification a copy of the Pre-Final indicating the proposals.
>
> 6. That on the 26th day of February, 1996 I therefore wrote to the Chief City Engineer of the Kingston and Saint Andrew Corporation informing him of the intention of the Ministry to widen Waterloo Road and South Avenue and requesting an investigation as to whether a Building Permit was issued to that parcel of land in the light of the plans of the Ministry. There is now produced and shown to me marked "LW 2" for identification a copy of the said letter.
>
> 7. That on the 25th March, 1996 I attended a Meeting on the site of No. 15 South Avenue at which Meeting Mr. White of the Kingston and St. Andrew Corporation, Mr. Colin Husbands and Mr. Perrier were also present.
>
> 8. That I attended the Meeting in order to see the manner in which the concerns of the Ministry would be satisfied.
>
> 9. That at the Meeting Mr. White indicated that buildings on South Avenue were required to have a set-back of at least five (5) feet from the edge of the roadway.
>
> 10. That at no time did I tell either Mr. Perrier or Mr. Colin Husbands that there were no proposals to widen South Avenue."

Then comes the crucial part of his evidence. It is this aspect which it seems has been the issue which has generated this litigation:

> "11. That roads can be widened even where no roadway reservations have been made, but in those circumstances the necessary area would be purchased.
>
> 12. That any widening of South Avenue as planned will require the removal of the existing sidewalks to create an extra storage lane for traffic proceeding on to Waterloo Road.
>
> ...
>
> 14. That the Letter dated February 26, 1996, mistakenly referred to 15 Waterloo Road instead of 15 South Avenue and to Mr. Perry instead of Mr. Perrier."

It is against that backgound that the gist of the appellant's case as regards the application to adduce further evidence must be considered. It was that he was given an assurance by Arnold White, the Deputy Surveyor that written permission would be given to confirm the oral promise that the building in progress was permissible and that written confirmation would follow. Arnold White was the official who issued the enforcement notice and the notice of irregularity. He is also the officer who completed the Building Application form on behalf of Auburn Court. The form at pages 78-82 of the record makes it clear that it was assessed by White on 4th March 1996. He was however silent concerning his statutory duty as to whether he approved of the drawings and if he did, whether they called for amendments or whether there was a dispute which required the intervention of the Building Authority. See sec 10 of the Building Act to which reference is to be made later in this judgment setting out the statutory provisions under this Act which relate to an application.

Many of the spaces were not filled in; for example, the builder's name and address was not supplied, nor was the applicant's signature. There is no indication that a registered engineer Mr. Collin Husbands was the consulting engineer on the project. To present an incomplete application form was prejudicial to the appellant's case. The affidavit evidence of Errol Bennett the Acting Assistant Town Clerk was, that Arnold White was present at the Committee meeting which refused the application. It is impossible to know what recommendation he gave or if he made any contribution to the Building and Town Planning Committee's deliberations. Arnold White stated in his affidavit at page 73 of the record:

> "14. That as Deputy Surveyor it is part of my duties to inspect premises for various purposes and to give evidence to the KSAC in its deliberations."

The fresh evidence was considered de bene esse and I would have admitted it and ordered cross-examination if I had not decided that the enforcement and irregularity notices issued by the K.S.A.C. were to be quashed as they were invalid in any event. Two cases were cited by the appellant to explain the basis of admitting fresh evidence. **Regina v West Sussex Quarter Sessions Ex parte Albert and Maud Johnson Trust Ltd.** [1974] 1 QB 24 and **R v. Secretary of State for the Environment and another ex parte Powis** [1981] 1 All E.R. 788.

At page 797 of the latter case the principles on which the Court exercises its discretion to admit fresh evidence were set out as follows:

> "Finally there was an application on behalf of the appellant to admit fresh evidence which the Divisional Court had refused to admit. Like the Divisional Court we considered the evidence de

> bene esse. What are the principles on which fresh evidence should be admitted on judicial review? They are: (1) that the court can receive evidence to show what material was before the minister or inferior tribunal (see per Lord Denning MR in **Ashbridge Investments Ltd v Minister of Housing and Local Government** [1965] 3 All ER 371 at 374, [1965] 1 WLR 1320 at 1327; (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact, or where the question is whether essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error (see de Smith's Judicial Review of Administrative Action (4th Edn, 1980, pp 140-141 and cases there cited)): (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. Examples of such misconduct are bias by the decision-making body, or fraud or perjury by a party. In each case fresh evidence is admissible to prove the particular misconduct alleged (see **R v West Sussex Quarter Sessions** [1973] 3 All ER 289 at 298, 301, [1974] QB 24 at 39, 42 per Orr and Lawton LJJ)."

I would have admitted the fresh evidence so that a finding of fact could have been made as to the assurance alleged to have been given to Mr. Perrier and Mr. Lorn Whittaker, the Chief Traffic Engineer. It was also important for the Building Authority to know the nature of the dispute between Auburn Court and the Deputy Surveyor. Further, the issue of White's conduct should have been considered.

Grave charges were made against Mr. Delbert Perrier in the Court below thus, at page 124 of the record :

> "The orders sought to wit, Certiorari and Prohibition are discretionary remedies. Even where a person may be awarded certiorari ex debito justitiae the Court retains a discretion to refuse his application, if his conduct has been such as to disentitle him to relief. The Court is entitled to have

> regard generally to the conduct of the applicant and to the special circumstances of the case in deciding whether to grant him the remedy he seeks.
>
> In the instant case the applicant was served a notice to cease building in that he had no permission so to do. He deliberately refused to obey the lawful order of the prescribed authorities. His conduct, if I may borrow the words of **Singleton L.J. in Ex parte Fry** [1954] 1 W.L.R. (CA) 730 at p. 735—
>
> "was extra-ordinarily foolish."
>
> The discretion of the Court ought not to be exercised in the favour of one who has behaved so unreasonably. This type of conduct militates against the development of a well organized society and makes governance extremely difficult.
>
> Persons who flout the law so flagrantly must not expect the Court to come to their aid. The Court takes judicial notice of the number of persons prosecuted in the Courts of the island for erecting buildings without first obtaining permission so to do.
>
> This kind of disregard for the law has had the effect of ruining many neighbourhoods causing extensive economic loss to owners of property."

The Court below did not have the evidence considered by this Court de bene esse but it did have the unchallenged evidence that Arnold White filled in the application form for Auburn Court. That was definitely a conflict of interest as he was on the advisory panel which considered the application he had prepared and submitted. Also the evidence of Delbert Perrier and Colin Husbands about the assurance given by Arnold White ought to have been considered and perhaps cross-examination ought to have been ordered.

There seems to be a misconception that an application to hear fresh evidence may be made to the Supreme Court despite sec. 42 of the Judicature

(Supreme Court) Act. The following passage from the **West Sussex Quarter Session** case (supra) which gives the historic evolution of section 42 may be useful. At page 35 [1974] Q.B. 24 Lord Denning said:

> "... Every legal system should provide machinery for a new trial when the justice of the case so requires. Our own legal system has always had such machinery to hand in regard to the superior courts. In the case of trial by jury (whose decisions on fact could not be appealed and were not subject to review) Lord Mansfield C,J. said:
>
> > 'If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial': see **Bright v Eynon** (1757) 1 Burr. 390, 393-394.
>
> After that ruling, the courts of common law regularly made an order for a new trial whenever the justice of he case so required, including cases where fresh evidence was discovered which vitiated the previous decision. It is so stated by the most reliable textbooks of that time, such as **Tidd's Practices** 9th ed. (1828), vol. II, p. 906: **Chitty's General** Practices (1824), vol. III, pp. 823, 832. Similarly, the Court of Chancery would allow a bill of review upon discovery of new matter. In **Hosking v. Terry** (1862) 15 Moo.P.C.C. 493, 503-504 Lord Kingsdown said:
>
> > '. . . the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself and of his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and secondly, that it is of such a character that, if it had been brought

> forward in the suit, it might probably have altered the judgment.'
>
> Such were the rules in regard to the superior courts before there was an appeal to a Court of Appeal. The rules are very similar today but they are exercised by the Court of Appeal: see **Ladd v. Marshall** [1954] 1 W.L.R. 1489 and **In re Barrell Enterprises** [1973] 1 W.L.R. 19."

Additionally, the appellant relied on **Lever Finance Ltd.v. Westminister (City) London Borough Council** [1971] Q.B. 222 to establish that the oral promise by Arnold White if it was so established would have been binding on the K.S.A.C. I do not propose to decide this matter because to do so would require cross-examination of the relevant parties and a further decision as to whether **Lever Finance** is applicable to permission to build as distinct from the variation of building plans which were previously submitted and approved. In the light of my decision on the invalidity of both enforcement notices and the irregularity notice such a decision is not necessary. The appellant made out a case for the reception of fresh evidence but having regard to my findings on the three notices in issue it is not necessary to admit it. I would add that if an appellant is entitled ex debito justitiae to certiorari it is doubtful if there is discretion to refuse the remedy.

As to ii – The issue of natural justice

The claim by the appellant is that it ought to have been accorded a hearing before the issue of the enforcement notice, the irregularity notice and the refusal by the K.S.A.C. to grant permission to carry out the building works which has been the issue in these proceedings.

With respect to the submission that there is always a common law right to a hearing before the enforcement notice is issued, the following statements of principle in **Wiseman v. Borneman** ([1971] A.C. 297 (H.L.))by Lord Reid, (at page 308) is powerful reflection for such a submission:

> "My Lords, I agree with your Lordships that this appeal should be dismissed and I shall only add a few observations. Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and –fast rules. For a long time the courts have, without objection from parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. ..."

Then continuing His Lordship said on the same page:

> "It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

There is generally an implication that a hearing will be provided once a notice is issued. The hearing may be implied by the common law or expressly provided by statutes. Where a tribunal is provided there is no need to superimpose a hearing at common law. This was the substance of the submission by Mr. Campbell Q.C. for the respondents and it was well founded.

Section 23A of the Town and Country Planning Act provides that an appeal to the Tribunal should be made within twenty-eight days service of the notice of appeal challenging the issue of an enforcement notice.

In coming to this conclusion it must be acknowledged that before the notice was served an official from the Town Planning Department or the K.S.A.C. inspected the building and noticed the breaches of the law. So the notice is akin to finding a prima facie case without a hearing. The examples of preferring an indictment or laying an information came readily to mind and such proceedings without a hearing were sanctioned by **Wiseman v. Borneman.**

With respect to the irregularity notice issued pursuant to section 38 of the Building Act it was pointed out previously that section 39 of the said Act demonstrates firstly that an irregularity notice must contain the essentials mandated in section 38 and section 76 to be a valid notice. Secondly, provision is made for a hearing before a judicial tribunal and the order of that tribunal may be issued to secure compliance with the Act. See sections 39 and 40 of the said Building Act. Further, there are appeals from the Court of Petty Sessions and the Resident Magistrate's Court

So with respect to the enforcement notices and the notice of irregularity there was no need to superimpose a common law right of a hearing where the statutory provisions enshrine such a right.

Constitutional government is limited government. The Constitution and the laws which are permissible, impose restraints on Government which includes local authorities whenever there are necessary interferences with fundamental rights or other rights. Property rights are enshrined in the Constitution, statute and

the common law. So these laws bind the Government as well as anyone within Jamaica. This is the kernel of our constitutional system. It is against this background that sections 38, 39, 40 and 76 of the Building Act and section 23(2) and (4) of the Act referred to previously must be considered.

This issue of natural justice, a common law right, is closely connected with the grounds of appeal at pages 3-4 of the record which read:

> "(ii) That the decision of refusal of approval for building be invalid in that there is no evidence to support them
>
> ...
>
> (iv) That the refusal of permission and/or failure to issue written approval was arbitrary and/or unreasonable."

With regard to the letter of refusal of the Kingston and St. Andrew Corporation it reads as follows:

> "Kingston & St. Andrew Corporation
>
> Town Clerk's Office
> Kingston, Jamaica
> 1st July, 1996
>
> Auburn Court Limited
> 15 South Avenue
> **KINGSTON 10.**
> **Attention: Mr. Delbert Perrier**
>
> Dear Sir:
>
> Re: Building Application (Under the Town & Country Planning Act) and the Kingston & St. Andrew Building Act 15 South Avenue, Rest Pen, Kingston 10
>
> —
>
> I am directed to inform you that the Council's Building and Town Planning Committee of the Kingston and St. Andrew Corporation at its meeting held on 19th June, 1996 REFUSED your application to erect a single storey building consisting of 3,600 square feet of land to

be used for games, billiards and table tennis at the above address in accordance with the plans submitted.

Refusal is recommended under the Town and Country Planning Act and the Kingston & St. Andrew Building Act as set out below:-

1. REFUSAL under the Town & Country Planning Act, Kingston Development Order 1966 on the grounds "That the Development is incompatible with the character of the Neighbourhood".

2. REFUSAL under the Building Act on the grounds "That the Class, Type and Design is unsuitable to the locality".

You reserve the right however to appeal to the Chief Technical Director in the Ministry of Local Government and Works within twenty-eight (28) days of receipt of this letter.

One set of the plan is retained for our files.

Yours faithfully

ERROL A. BENNETT
For TOWN CLERK."

As explained there was a notice of appeal to the Chief Technical Director. It seems that this was not pursued in view of the application for judicial review. The notice reads as follows:

"3rd July, 1996

Chief Technical Director
Ministry of Local Government & Works
140 Maxfield Avenue

Kingston 10

Re: Building Application – 15 South Avenue, Rest Pen, Kingston 10.

> I refer to a letter dated 1st July, 1996 from the Kingston and St. Andrew Corporation advising that application to erect a single storey building to be used for games, billiards and table tennis purposes had been refused. (Copy attached for ease of reference.)
>
> Please be advised that I am aggrieved with the decision taken and hereby appeal against this decision.
>
> The amenities have been incorporated into the plan to facilitate the residents of 15 South Avenue in order to provide easy access to social amenities. Oaklands Apartments on Constant Spring Road has also provided social amenities (shopping area) for its residents, therefore in my opinion a similar situation exists and should be treated accordingly.
>
> In the circumstances, it would be greatly appreciated if this matter is reviewed and a favourable decision taken.
>
> Yours sincerely
>
> Delbert Perrier."

The affidavit evidence of Errol Bennett the Acting Assistant Town Clerk is relevant. It reads in part as follows at pages 11-14 of the record:

> "3. That I attend the meetings of the Council of the KSAC including those at which building/planning applications are considered and was present at the meeting of the KSAC sitting as the Building and Town Planning Committee on June 19, 1996.
>
> 4. That at the meetings at which Building/planning applications are considered the Council is aided by advice given by persons of expertise in the area of building and planning.
>
> 5. That at the meeting of June 19, 1996 at which the application of Auburn Court for building/planning permission was considered the following persons were on the panel of advisors." . .
>
> .

There was an impressive gathering of advisors including Mr. A. White described as the Chief Planning Officer. Be it noted that while the panel of advisors is listed the members of the Building & Town Planning Committee were not. Also absent was the report from the Surveyor as to the dispute between the Builder and the Surveyor which made it obligatory for the matter to be considered by the Building and Town Planning Committee. It is odd that the advisory panel is noted but the Committee is not. Then the Acting Assistant Town Clerk continues thus:

> "6. That the Council passed a resolution that all building applications should be submitted to the Building Authority for approval.
>
> 7. That the Council consists of the Mayor and Councillors."

Paragraph 6 above is important as the resolution was not exhibited but it is anticipated that this resolution did not derogate from the statutory duties of the Surveyor. Then comes the crucial paragraph which reads:

> "8. That the application of Auburn Court Limited was refused by the Council after considering advice by the advisory panel."

The following paragraps concluded the affidavit:

> "9. That every person whose plans or drawings have been refused by the Building Authority may appeal to the Tribunal of Appeal by leaving with the Building Authority a notice of his/her intention to appeal.
>
> 10. That this notice would contain the grounds of appeal, and an address for service
>
> 11. That no notice of appeal has been served on the KSAC signifying any intent to appeal the refusal of building application under the Building Act.

> 12. That all applications for building approval which are made pursuant to the Building Act are heard by the Council of the KSAC in its role as the Building Authority."

The following paragraphs are to be found in the affidavit of Arnold White at page 37 of the record:

> "33. That I attended the meeting of the Council of the KSAC which considered both the building application and the application for planning permission on the 19th June, 1996.
>
> 34. That I refer to the Affidavit of Errol Bennett dated 10th day of March, 1997 which indicates persons present at the meeting.
>
> 35. That both applications were refused as the class, type and design of the proposed building was unsuitable to the locality and the proposed building was incompatible with the character of the neighbourhood.
>
> 36. That in looking at the type of building the layout was considered and the location of whether a single, or even more so a two storey building, at or so near to the road boundary was inappropriate for the locality.
>
> 37. That on July 1, 1996 the applicant was advised that building and planning permission were refused."

Neither the above passages nor any other in Arnold White's affidavit disclosed that he prepared the application form (at pages 78-82 of the record) for a one storey building estimated to cost $3M. This form was incomplete in many respects. The builder's name is not supplied. The applicant did not sign the form. There is no indication on the form that the services of Colin Husbands a consulting engineer was secured. His affidavit at page 50 of the record states:

> "6...I designed and prepared detail working drawings of a two storey building to be constructed at premises No. 15 South Avenue, Kingston 10, aforesaid."

Then the affidavit of Delbert Perrier has the following paragraph at page 17 of the record:

> "9. That it was Mr. Arnold White the then Acting City Engineer who filled out the application Form to The Kingston and Saint Andrew Corporation, for the building permit at my request. I did tell him that the application was for a two storey building and the plans which I delivered to him are for a two storey building in keeping with what I told him. ... Mr. White never amended the Form or told me that it needed to be amended." (Emphasis supplied)

It is in the light of this evidence that the appellant claims in his ground of appeal that there was no evidence to support the refusal of the application. Maybe it would have been better to say there was no proper application before the K.S.A.C. Then the affidavit continues:

> "10. That although I discussed the application with Mr. White as the then Acting City Engineer, in submitting the application, and delivering the Plans to him for the proposed building he never at any time informed me of a proposal to widen South Avenue by the provision of a further slip road, which slip road would encroach on the Applicant's property and on the subject building."

So the issue must be raised as to why the Deputy Surveyor filled out the application form for Auburn Court. Was this part of his official duties? Was there not a conflict of interest amounting to misconduct on his part? After all he had not denied the statement by Mr. Perrier that he made up the application form on behalf of Auburn Court and assessed it. Further the inference is that he gave evidence to the Building Authority based on the application form he had completed and assessed. This misconduct is sufficient to taint the decision of the Building Committee and as a result if it was necessary the refusal letter of 1st July,

1996 ought to be quashed. The above issues are related to sections 27 and 28 of the Building Act which read:

"The Surveyor

> 27. With the exemptions hereinbefore mentioned, every building, and every work done to, in or upon, any building, shall be subject to the supervision of the Surveyor.
>
> 28. If the Surveyor is prevented by illness, infirmity or any other unavoidable circumstance, from attending to the duties of his office, he may, with the consent of the Corporation, appoint some person as his deputy, to perform all his duties for such time as he may be prevented from executing them."
>
> ...

Then section 30 reads:

> "30. If any building is erected, or any work done to, in or upon, any building, by or under the superintendence of the Surveyor acting professionally or on his own private account, it shall not be lawful for such Surveyor to survey any such building for the purpose of this Act, or to act as Surveyor in respect thereof, or in any matter connected therewith, but it shall be his duty to give notice thereof to the Corporation, who shall then appoint some other person to act as Surveyor in respect of such matter."(Emphasis supplied)

The filling out and the assessment of the application form by Arnold White is certainly "a matter connected therewith" and it is prohibited by section 30 of The Building Act.

Two issues arise from the above analysis. Firstly, whether there is a statutory duty on the Building Committee to have had Auburn Court in attendance before refusing permission. Secondly, whether in any event in the circumstances of this case there ought to have been a hearing accorded to Auburn Court by the Building Committee. Specific cases were cited to us where

a local authority demolished a building or wall without according the owner of the property a hearing. These cases are conveniently examined by Lord Reid in **Ridge and Baldwin** [1963] 2 All ER 66, 73:

> "I would start an examination of the authorities dealing with property rights and privileges with **Cooper v. Wandsworth Board of Works** (1863), 14 C.B.N.S. 180. Where an owner had failed to give proper notice to the board, they had under an Act of 1855. (See the Metropolis Management Act, 1855, s 76) authority to demolish any building which he had erected and recover the cost from him. This action was brought against the board because they had used that power without giving the owner an opportunity of being heard. The board maintained that their discretion to order demolition was not a judicial discretion and that any appeal should have been to the Metropolitan Board of Works. But the court decided unanimously in favour of the owner. ERLE, C.J. (1863), 14 C.B.N.S. at p. 189, held that the power was subject to a qualification repeatedly recognized that no man is to be deprived of his property without his having an opportunity of being heard and that this had been applied to "many exercises of power which in common understanding would not be at all a mere judicial proceeding than would be the act of the district board in ordering a house to be pulled down". WILLES, J., (1863), 14 C.B.N.S. at p. 190 said that the rule was "of universal application and founded on the plainest principles of justice" and BYLES, J. (1863), 14 C.B.N.S. at p. 194 said that:
>
> > 'although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.'
>
> This was followed in **Hopkins v. Smethwick Local Board of Health** (1890), 24 Q.B.D. 712. WILLS, J. (1890), 24 Q.B.D. at pp 714, 715 said:
>
> > 'In condemning a man to have his house pulled down a judicial act is as much implied as in fining him £5: and as the local board is the only tribunal that can make such an order its act must be a judicial act and the party to be affected should

> have a notice given him . . . The judgment of WILLES, J.) in **Cooper's** case (1890), 14 C.B.N.S. at pp. 190-194 goes far more upon the nature of the thing done by the board than on the phraseology of the Act itself. It deals with the case on principle: from the nature of the thing done it must be a judicial act and justice requires that the man should be heard.'
>
> In the Court of Appeal (1890), 24 Q.B.D. at pp. 716, 717 LORD ESHER, M.R. in dismissing an appeal expressly approved the principles laid down in **Cooper's** case (1863), 14 C.B.N.S. 180."

Then His Lordship continues thus:

> "The principle was applied in different cirumstances in **Smith v. R.**(1878), 3 App. Cas. 614. That was an action of ejectment on the alleged forfeiture of a Crown lease in Queensland. The governor was entitled to forfeit the lease if it has been proved to the satisfaction of a commissioner that the lessee had abandoned or ceased to reside on the land. The Commissioner did not disclose to the lessee the case against him so that he had no opportunity to meet it, and therefore the decision could not stand. The Commissioner was not bound by any rules as to procedure or evidence but he had to conduct his inquiry "according to the requirements of substantial justice". In **De Verteuil v. Knaggs** [1918] A.C. 557 the governor of Trinidad was entitled to remove immigrants from an estate "on sufficient ground shown to his satisfaction." LORD PARMOOR [1918] A.C. at p. 560 said that
>
> > 'the acting governor was not called upon to give a decision on an appeal between parties and it is not suggested that he holds the position of a judge or that the appellant is entitled to insist on the forms used in ordinary judicial procedure . . .'
>
> but he had
>
> > ' . . . a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to

> correct or controvert any relevant statement brought forward to his prejudice.'
>
> The duty of an official architect in fixing a building line was stated in somewhat similar terms in **Spackman v. Plumstead Board of Works** (1885), 10 App. Cas. 229."

To my mind the necessary implication from section 10 of the Building Act is that if the Town and Country Planning Committee is minded to refuse a Building Application it should accord the applicant a hearing which in some instances may be by written representations. Further he should be informed of the nature of the dispute with the Surveyor so that he can present his case to the Committee. If this analysis is correct it is necessary to turn to section 10 to ascertain what it says expressly on the right to a hearing, or what must be inferred from the words used and the subject matter about such a right.

As to iii- The provisions for a hearing as provided for by the Building Act

How is the hearing provided for in the Building Act? Before answering this question the statutory provision relating to application must be stated. Section 10 of the Building Act reads:

> "10.-(1) Every person who proposes to erect or re-erect any building or any part thereof, or to extend any building or any part thereof, shall give notice thereof to the Building Authority, and such notice shall be accompanied by –
>
> (a) An accurate ground plan showing the land or site, the frontage line for length of twenty feet, of any building, whether standing or in ruins, adjacent on each side thereof, and the full width of the street or streets immediately in front and at the side or back thereof, if any
>
> (b) An accurate plan showing the several floors of such building and the front elevation thereof and at least one cross section and such other cross or longitudinal sections and further

> particulars, as the Building Authority may from time to time by regulation or in any particular case require.
>
> (c) An accurate plan showing the frontage of such building on any street or lane.
>
> . . .".

Then the role of the Surveyor is indicated thus:

> "All such plans shall be to a scale not smaller than one-eight of an inch to one foot, and the Surveyor shall, if he approve of such drawings, notify his approval of the same in writing to the builder, or he may call for amended drawings for approval or otherwise. In case of dispute the matter shall be submitted to the Building Authority:
> . . . ."(Emphasis supplied)

So there must have been a "dispute" at this point for the matter to be referred to the Building Authority for resolution. Implicit in the word dispute is that there must be a hearing however informal. There is no evidence that Auburn Court received approval of the drawings, that there was any call for amendment, nor that there was a dispute between Auburn Court and the Surveyor. There was no evidence as to the basis on which the issue was referred to the Building Authority. If there was a decision by the Surveyor against the appellant it should have been recorded in writing for the benefit of the appellant and the Building Authority. It must be borne in mind that it was Arnold White who submitted and assessed this application.

Then the section continues:

> "Provided always that no plans shall be approved as hereinbefore mentioned unless the class of building and the frontage, elevation and design are in opinion of the Building Authority suitable to the locality or neighbourhood and unless they make provision for sanitary

> arrangements to the satisfaction of the Surveyor or the Building Authority or in cases where house sewers cannot be required, to the satisfaction of the Corporation, nor unless plans under the Kingston Improvements Act have been approved by the Building Authority. The Building Authority may also at any time before or after the work has been commenced, require the builder or owner to submit such working drawings or detailed plans as, and drawn to such scale as the Surveyor may prescribe. The procedure in regard to approval or otherwise of such working drawings or detailed plans shall be in all respects as above described: . . ." (Emphasis supplied)

So in this instance also if there is a dispute on the issue of "design being unsuitable to the locality" the very issue on which the letter of refusal was based, the Authority is obliged to call for drawings prescribed by the Surveyor on this aspect and if there is a dispute between the Surveyor and the appellant on this issue it must be resolved by the Town and Country Planning Committee. There was no evidence that this mandatory procedure was followed before the letter of refusal was issued. To resolve this however, without a hearing, however informal is to fail to follow the procedure prescribed by the Building Act, to the prejudice of the appellant. Section 10 continues:

> "Provided also that the Surveyor may in his discretion accept a notice unaccompanied by plans and approve of the building proposed subject to such written instructions or directions as may from time to time be given by the Surveyor or Building Authority, and in such case any failure to comply with any of such instructions or directions shall for the purposes of the next subsection be deemed to be a deviation from the approved plan"

Then sub-section (2) of section 10 which imposes sanctions is of equal importance. It reads:

> "(2) Every person who shall erect, or begin to erect or re-erect, or extend, or cause or procure the erection, re-erection or extension of any such building or any part thereof, without previously obtaining the written approval of the Building Authority; or , in case of dispute, of the tribunal of appeal, or otherwise than in conformity with such approval; and every builder or other person who shall, in the erection, re-erection or extension of any such building or part thereof deviate from the plan approved by the Building Authority; or in the case of detailed or working drawings, by the Surveyor or the tribunal of appeal, shall be guilty of an offence against this Act, and liable to a penalty not exceeding fifty thousand dollars, besides being ordered by the Court to take down the said building or part thereof, or to alter the same in such way as the Surveyor shall direct, so as to make it in conformity with the approval of the Building Authority or the tribunal of appeal."

Implicit in section 10 is that there should be an initial hearing before the Surveyor and if there isdispute a further hearing before the Building Authority if there is a refusal. Subsequently, there is a hearing by way of appeal before the Tribunal of Appeal. There is no need to superimpose common law principle of natural justice. It is the failure to follow the mandatory procedures of the Building Act which implies a hearing when there is a dispute between the Surveyor and the Builder which empowers this Court to quash paragraph 2 in the letter of refusal of 1st July, 1996. It has already been decided that paragraph 1 must also be quashed as the K.S.A.C. had no authority to make a refusal under the Town and Country Planning Act. Of equal importance is that the enforcement procedure in section 10(2) of theBuilding Act requires the proper procedural steps to be taken before the Resident Magistrate punishes the applicant or orders alteration or demolition.

As to iv and v dealing with the prayer for an order of prohibition and complaint about the 1966 Development Order ;

There is no need now to issue an order of Prohibition since the order of certiorari will quash the two enforcement notices, the irregularity notice, and the letter of refusal to carry out the building project by Auburn Court at South Avenue. Liberty to apply is being provided for in the order just in case there is the need to come to the Court for an order of Prohibition.

As for the complaint of the misdescription in the enforcement notice of the Town and Country Planning (Kingston) Confirmed Development Order 1965 published in the Jamaica Gazette Supplement July 22, 1966, that was a complaint without merit, as the Court below found. It is convenient at this point to state that reference has been made to the Building Authority in the Building Act. It is defined thus in sec. 2 of that Act:

> "The "Building Authority" and "Corporation" mean the Council of the Kingston and St. Andrew Corporation appointed and constituted under the provisions of the Kingston and St. 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 and
>
> "Tribunal of Appeal means the Chief Technical Director."

Conclusion

The Town and Country Planning Act and the Kingston and St. Andrew Building Act are two powerful means of controlling the orderly development of the Kingston Metropolitan area so as to protect the environment. Enforcement and Irregularity notices are two of the instruments provided for in these statutes to be used by the Town Planner or the Local Planning Authority which is the K.S.A.C.

Safeguards are provided to landowners, builders and developers and these procedural safeguards are the protection the law accords to property owners. It is the judiciary, by virtue of section 20 of the Constitution which ensures that the protection provided for in the Constitution, the statute and common law is accorded to anyone in Jamaica. The mandatory procedures which provide the safeguards were not followed in this instant case. There have been adverse comments in the Court below and from the respondents on the conduct of Mr. Delbert Perrier the Managing Director of Auburn Court. However, there was evidence that the Deputy Building Surveyor of the K.S.A.C gave an oral assurance that the building plans were approved and that it would be confirmed in writing. Perrier's conduct must be understood in the light of the allegations made against the Deputy Surveyor. He had that power if there were no dispute between himself and Auburn Court. The issues in this case arose because the Chief Traffic Engineer had plans for improvement of traffic flow in the Waterloo/South Avenue area. His concerns could not be ignored. His Ministry has a powerful role in the affairs of the K.S.A.C. It was the Deputy Surveyor, Mr. White, who prepared the application forms for the Building Authority. This conflicted with his duties as Deputy Surveyor. Strictures concerning Mr. Perrier must be considered against this background. Moreover, neither the Town Planner nor the K.S.A.C. could properly use the invalid enforcement and irregularity notices in issue to institute either civil or criminal proceedings in the Resident Magistrate's Court or the Court of Petty Sessions. Coupled with all this was the failure to accord Auburn Court a hearing within the

intendment of section 10 of the Building Act before the letter of refusal was forwarded to the Company and Mr. Delbert Perrier.

The upshot of all this is that the appeal must be allowed, the order below refusing the application for certorari must be set aside. Certorari must issue to quash the two enforcement notices, the irregularity notice and the decision of the K.S.A.C. refusing the application of the appellant to carry out its building programme.

No decision has been taken on the issue of the order for Prohibition and liberty to apply is given in case it is found necessary to adjudicate on this matter. The agreed or taxed costs both here and below are to go to the appellant. The order I would propose therefore is as follows:

(1) Appeal allowed

(2) Certiorari to issue to quash the two enforcement notices, the irregularity notice, and the decision of the K.S.A.C. refusing the application of Auburn Court to carry out its building plans

(3) Liberty to apply

(4) Costs both here and below are to be paid by the respondents to the appellant

Addendum

(1) There seems to be an issue as to whether there was an appeal against both enforcement notices or one. The original ground 1 of the Notice of Appeal at page 3 of the record in relation to Motion 101/1996 refers to "the said notice dated 22nd August, 1996". As this was the Motion in relation to the K.S.A.C. the proper date for the enforcement notice was 29th April, 1996 at page 86 of the record.

(2) Ground 111 of original grounds also at page 3 of the record refers to the "issue of the said notice" and this refers to Motion 102/96 which pertains to the Town Planner and this must refer to the enforcement notice of 22nd August, 1996.

(3) There was a ground of appeal dated the 22nd February, 1999 which was admitted at the initial hearing of this appeal. It reads:

> "The Enforcement Notice showed procedural impropriety and irrationality."

(4) During the hearing of this appeal the following ground was formulated and accepted:

> "Enforcement notice of 29th April 1996, was invalid."

HARRISON, J.A.:

This is an appeal by Auburn Court Limited (the appellant) from the decision of the Full Court (Wolfe, C.J., Ellis, J. and Clarke, J.) on May 16, 1997, dismissing motions seeking orders of certiorari and prohibition to quash the notice and the decision of the respondents in respect of a building being constructed at 15 South Avenue, Rest Pen, St. Andrew, registered at Volume 1127 Folio 105 of the Register Book of Titles.

The grounds of appeal, summarised, are that:

1. In respect of motion No. M101/96:

The issued notice dated August 22, 1996, and the refusal of the appellant's application were in breach of the principles of natural justice, in that the appellant was not given a prior opportunity to be heard, there was no valid reason for its refusal and the applicant had a legitimate expectation that it would have been granted;

2. the refusal of approval for building permission was invalid, in that there was no evidence to support it.

In respect of motion No. M102/96:

3. as in (1) above;

4. the refusal to give written approval was arbitrary and unreasonable; and

5. the notice is void, in alleging a contravention of the Town and Country Planning (Kingston) Confirmed Development Order, 1996, which order does not exist.

The relevant facts are that the appellant, the owner of a block of apartments at the said premises, commenced the construction of a building adjacent thereto to house certain recreational facilities, namely, a bowling

alley and an area for table tennis and other games, for the benefit of the occupants of the apartments.

In mid-January 1996, Mr. Lorn Whittaker, then Chief Traffic Engineer of the Ministry of Local Government and Works observed the construction of the said recreational building. Being aware of a proposal by the said Ministry for road improvement by the widening of South Avenue, he was of the view that the said building may have been within the area of the road widening. On February 26, 1996, he wrote to Arnold White, the Chief City Engineer of the Kingston and St. Andrew Corporation (KSAC), advising him of the Ministry's proposals and enquired whether a building permit had been granted by the KSAC for the said construction. Up to that date no application for the erection of the said building had been made by the appellant.

On March 4, 1996, the appellant filed with the KSAC an application to construct a one-storey building at the said premises and paid the requisite fees.

No building plans in respect of the said construction were submitted with the application.

On March 25, 1996, a meeting was held at the site at 15 South Avenue. Present were Lorn Whittaker, Arnold White, Delbert Perrier, managing director of the appellant, and Colin Husbands, consulting engineer to the appellant. Lorn Whittaker deponed in his affidavit dated May 12, 1997, that he:

> "...attended the meeting in order to see the manner in which the concerns of the Ministry would be satisfied...at that meeting Mr. White indicated that buildings on South Avenue were required to have a

> set-back of at least five (5) feet from the edge of the roadway."

Under construction on the said premises was a two-storied building, within the area reserved for road widening and with its outer wall 2 feet 6 inches from the boundary. Arnold White, in his affidavit dated March 10, 1997, deponed:

> "**18.** ...it is the practice of the KSAC to require buildings on South Avenue to have a set-back from the roadway of 5 feet per storey for aesthetic purposes so that a 2 storey building would be required to have a set-back of at least 10 feet.
>
> **19.** That on the 25th March, 1996 at the site I advised Mr. Perrier to cease work on the building as his application for building/planning permission had not yet been processed or considered.
>
> **20.** That at no time on that date or any other date did I tell Mr. Perrier or Mr. Husbands that the plans submitted would be approved or were certain to be approved pursuant to the Building Act or the Town and Country Planning Act." [Emphasis added]

On March 28, 1996, the appellant submitted to the KSAC the plans in support of the application for the said construction.

An enforcement notice under the provisions of section 23 of the Town and Country Planning Act was issued and served by the KSAC on the appellant on April 29, 1996, requiring it to discontinue the use and further development of the land. The appellant continued the construction.

The Government Town Planner, Mrs. Blossom Samuels, in February 1996, also saw the said building and noted its "...closeness...to the roadway...". She was aware of the enforcement notice served on April 29, 1996, and that the construction continued although no permission had been

granted by the KSAC. By means of a site inspection on August 6, 1996, Mrs. Samuels discovered:

> "A new two (2) storey building of reinforced concrete...along the southern boundary of the premises... The structure was essentially completed. ... The building was already rendered and partially painted."

On August 22, 1996, the said Town Planner issued an enforcement notice which was served on site on Delbert Perrier, on behalf of the appellant. A copy of the notice was affixed to the offending building, and the said notice was published in the Gleaner publication of 30th August 1996. This notice was issued pursuant to section 23 of the Town and Country Planning Act requiring the appellant to remedy the breach committed, by discontinuing the development and restoring the land to the state in which it was before the development took place.

On June 19, 1996, at a meeting of the Council of the KSAC, the application of the appellant for building permission was considered by the building authority and after advice by the advisory panel, the application was refused.

Consequently, on July 1, 1996, the appellant was advised that the application for building planning permission was refused.

On September 18, 1996, the appellant appealed against the enforcement notice dated August 22, 1996, by letter, curiously dated May 18, 1996. The appeal, listed for hearing by the Appeals Tribunal on October 8, 1996, was adjourned October 30, 1996, and further to November 6, 1996. On the latter date, the hearing was adjourned. The Appeals Tribunal was

advised that the appellant had applied to the Supreme Court for an order of certiorari to quash the said enforcement notice. The motions were dismissed, resulting in the current appeal.

Mr. Francis for the appellant applied to this court for leave to adduce fresh evidence of Delbert Perrier contained in affidavit exhibiting a letter dated March 15, 1999, from the said Lorn Whittaker to Berthan Macaulay, Q.C. The substance of the letter was that there was a site meeting on March 25, 1996:

> "Based on the meeting I was told by Mr. White from the Kingston & St. Andrew Corporation that the improvement was approved and this confirmation would have been done in writing and subsequently sent to me, the then Chief Traffic Engineer."

Mr. Francis argued that the evidence satisfied the criteria for the admission of fresh evidence by the court, that the said evidence came to the attention of the appellant after the hearing before the Full Court which was deprived of the opportunity to hear this evidence which was credible and vital to the issue. Mr. Campbell for the respondents opposed the application stating that the proposed evidence, when examined by the court, would be seen as not being within the category to make it admissible, and that the KSAC Building Act expressly stated that approval should be in writing.

Rule 18(2) of the Court of Appeal Rules, 1962 gives to the court the discretion to hear further evidence. It reads:

> "**18. (2)** The Court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on special grounds".

Generally, the bases on which the court will exercise its discretion to admit fresh evidence are that the fresh evidence was not available at the first trial, that it is credible and probably would have affected the outcome if it had been called at the trial: ***Reg. vs. West Sussex Quarter Sessions, Ex parte Johnson Trust Ltd. et al*** [1974] 1 Q.B. 24, applying the ratio of ***Ladd v. Marshall*** [1954] 1 W.L.R. 1489.

In the instant case, the "fresh evidence", being the statement of Lorn Whittaker alleging what Arnold White said at the meeting of March 25, 1996, cannot qualify as not having been available at the hearing. The affidavit of Lorn Whittaker dated May 12, 1997, which was in evidence before the Full Court, having recounted the events of the meeting of March 25, 1996, did not mention any such statement by Arnold White.

Delbert Perrier, in his affidavit dated May 13, 1997, stated:

> "**3.** ...it is true that Mr. White told me at the site meeting on the said 28th day of March, 1996 that the plans submitted for the building were approved."

Furthermore, the affidavit of Collin Husbands dated November 6, 1996, also admitted at the hearing, reveals that:

> "**10.** At the meeting Mr. Whyte pointed out to Mr. Whittaker that there was a 'set back' from the Lot boundary to the longitudinal side of the building of approximately two feet six inches (2' x 6") and stated that the Plans had accordingly been approved and were being processed for collection."

Arnold White in his affidavit dated March 10, 1997, which affidavit was also at the said hearing, In contrast stated that:

> "**20.** ...at no time on that date or any other date did I tell Mr. Perrier or Mr. Husbands that the plans submitted would be approved or were certain to be approved..."

The uncontroverted evidence before the Full Court was that the said relevant plans were not submitted until March 28, 1996. The "further evidence" was therefore not credible and was quite available and considered at the hearing. The said issue of what Arnold White said was fully aired at the hearing and the contention of the appellant was rejected by the Full Court.

Judicial review is concerned with the propriety of the decision-making body and not the decision itself, and therefore the admission of fresh evidence in an effort to influence the decision based on the facts is inappropriate in certiorari proceedings: (***R. v. Secretary of State for the Environment, ex parte Powis*** [1981] 1 All E.R. 788).

I maintain that the application to lead fresh evidence should be refused.

In respect of the substantive appeal, Mr. Francis argued that the Building Authority of the KSAC failed to give to the appellant an opportunity to be heard on June 19, 1996, when its application for building permission was heard and refused. Neither was an opportunity granted to the appellant to present its case against the issuance of the notice dated August 22, 1996. The appellant's property rights would be affected and therefore he was entitled to a viva voce hearing. Both denials, he argued, were in breach of

natural justice. He stated that the appellant had a legitimate expectation that his application would have been approved, based on the said assurance of Arnold White. Mr. Francis did concede that there was no evidence of course of conduct of Arnold White nor prior dealing between the latter and the appellant to base his argument on legitimate expectation in respect of grounds (1) and (2).

Mr. Campbell for the respondent argued that the fundamental rule of fairness, to give to the appellant the right to be heard, was satisfied by the scheme of the Town and Country Planning Act. The appellant was not entitled to a viva voce hearing at the stage when its application was considered initially, but it had a full opportunity to be heard at the appeal stage which was akin to an original hearing where all its plans and diagrams would be examined and considered and its arguments heard. The scheme of the Act is to ensure expedition and to save expense. No prejudice was suffered by the issuance of the notice of August 22, 1996; it was certain and valid stating both the period when it was to take effect and when its directions should be carried out. The appellant's conduct was contemptuous of the building surveyor and the authorities he concluded, and therefore, the court should be reluctant to come to its aid.

Under the provisions of the Kingston and St. Andrew Corporation Building Act ("KSAC Act"), anyone who wishes to erect a building in the corporate area is required to seek the prior approval of the Building Authority of the KSAC - (Section 10).

The Town and Country Planning Act provides a comprehensive system for controlled development or user of land, to which all local authorities, including the KSAC, are subject. "Development" is defined in the said Act, in section 5(2):

> "**5.—(2)** In this Act, unless the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land:..."

The Town and Country Planning Authority (the Authority) appointed under the said Act (section 3) has an overriding authority to control the development of land in the Island. Section 5(1) reads:

> "**5.--(1)** The Authority may after consultation with any local authority concerned prepare so many or such provisional development orders as the Authority may consider necessary in relation to any land, in any urban or rural area, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the respective order applies, and with a view to securing proper sanitary conditions and conveniences and the co-ordination of roads and public services, protecting and extending the amenities and conserving and developing the resources, of such area."

This mandate to effect the orderly development of land may be effected by means of enforcement notices. Section 23(1) reads:

> "**23.—(1)** If it appears to the local planning authority, the Government Town Planner or the Authority that any development of land has been carried out after the coming into operation of a development order relating to such land without the grant of permission required in that behalf under Part III, or that any conditions subject to which such permission was granted in respect of

> any development have not been complied with, then subject to any directions given by the Minister, the local planning authority, the Government Town Planner or the Authority may within five years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development order and to any other material considerations, serve on the owner and occupier of the land and any person who carries out or takes steps to carry out any development of such land and any other person concerned in the preparation of the development plans or the management of the development or operations on such land, a notice under this section."

The said section of the Act provides for the mode of service of the notice (2A)(a) & (b)), when the said notice takes effect:

> "...at the expiration of three days after the service thereof...,"

and makes provision for any appeal to any Appeal Tribunal established under section 22A; section 23A(1) reads:

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

Additionally, the latter Act recognizes the functions of the local planning authority, its powers and limitations. Section 11(1) reads:

> "**11.—(1)** Subject to the provisions of this section and section 12, <u>where application is made to a local planning authority</u> for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; <u>and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto</u>, and to any other material considerations." [Emphasis added]

Provision is also made for an appeal where an application is refused. Section 13(1) reads:

> "**13.—(1)** Where application is made under this Part to a local planning authority for permission to develop land or where such application is referred to the Authority under the provisions of section 12, and that permission is refused by the local planning authority or the Authority, as the case may be, or is granted subject to conditions, then if the applicant is aggrieved by the decision so taken he may by notice served within the time, not being less than twenty-eight days from the receipt of the notification of the decision, and in the manner prescribed by the development order, appeal to the Minister:..." [Emphasis added]

In the instant case, the relevant development order, then in force, and under the provisions of which the Government Town Planner issued the said enforcement notice of August 22, 1996, is the Town and Country Planning (Kingston) Confirmed Development Order, 1965, published in the Jamaica Gazette Supplement dated July 22, 1996.

The appellant complains that the Full Court was wrong to dismiss its motions that certiorari should go and that prohibition should issue, to quash the enforcement notice of the Town Planner and the refusal of approval of the appellant's application to construct its building, and to prohibit the said Town Planner and the Building Authority of the KSAC from enforcing the said notice.

Authorities, bodies and committees which function in the public sphere have a duty to observe the rules of natural justice, and therefore are subject to judicial review. Simply put, such entities must act fairly. One of the principal instances of the demonstration of such fairness is the rule that an

individual who may be adversely affected by the decision of such a public body acting judicially, quasi-judicially or even performing administrative functions, must be given the opportunity to be heard prior to the making of the decision.

This was not always clearly accepted to be "of universal application", until the decision in ***Ridge v. Baldwin*** [1964] A.C. 40. It was there decided that a chief constable was not treated fairly by the Watch Committee which dismissed him without notifying him of the charges preferred against him and without giving him a chance to be heard in his defence.

This principle was accepted as early as 1863 in the case of ***Cooper v. Wandsworth Board of Works*** [(1863) 14 C.B.N.S. 180], and followed in ***Ridge v. Baldwin*** (supra). The statutory provisions required a prospective builder of a home in London to give seven days prior to notice to the local Board of Works. The builder failed to do so and commenced erecting a house and reached the second storey. The Board of Works without any notice to him, sent men late one night and demolished the house, as the statute authorised it to do. Although this was an administrative act, the builder successfully sued the Board of Works, which it was held, had no power to so act without first allowing him to be heard. Willes, J. said:

> "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice."

Byles, J. said:

> "It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy."

This concept was further confirmed in ***Hopkins et al v. Smethwick Local Board of Health*** (1890) 24 Q.B.D. 712 (following ***Cooper v. Wandsworth*** (supra)), where the Court of Appeal held that a building erected in breach of a bye-law of a local health board should not be pulled down without giving the owner an opportunity to show cause why it should not be pulled down.

The duty to act fairly is a flexible principle. The underlying fact must be that no prejudice must be occasioned to the person affected by the decision. In some cases fairness is equally achieved by a hearing given to such a person affected, after the decision is made, for example, at a later stage in appeal proceedings provided by the statute.

In ***Wiseman et al v. Borneman et al*** [1971] A.C. 297 it was held that a tribunal which refused to allow the appellant to be heard by counsel, when it was considering whether or not a prima facie case was made out against him, was not acting unfairly, because the documents available to the said tribunal, including a statutory declaration from the appellant, gave the appellant a sufficient opportunity to state his case to the tribunal. The appellant had made a statutory declaration of certain transactions to the Inland Revenue Commissioners under the Finance Act 1960 (U.K.) and the said commissioners sent the declaration along with their certificate and counter-statement to the tribunal for consideration and determination of

action. The appellants, by summons, sought copies of the said certificate and statement in addition to the right to appear before the commissioners. The summons was struck out, the decision affirmed by the Court of Appeal and approved by the House of Lords. The headnote of the latter proceedings reads, at page 298:

> "*Held*, dismissing the appeal, that section 28 of the Finance Act, 1960, gave the taxpayer a sufficient opportunity of stating his contentions to the tribunal and that the tribunal was entitled to make its determination on the documents specified for there was nothing so unfair about the procedure specified in the section as to entitle the court to say that the principles of natural justice were not followed."

Lord Reid observed at page 308:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

Lord Guest, referring to the principles of fairness, said at page 311:

> "The true view, in my opinion, is that expressed by Tucker L.J. in ***Russell v. Duke of Norfolk*** [1949] 1 All E.R. 109, 118:
>
> > 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under

> which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'."

Contending that there is no difference in an approach between a decision which is a prima facie case to take action and a final decision, Lord Wilberforce agreed that the appeal should be dismissed, but said, at page 320:

> "My Lords, not without some hesitation, and although cases can be imagined in which the taxpayer may be at some disadvantage, still upon a broad view of the matter, and taking the normal case, I have come to the conclusion that the revenue's contention ought to be accepted. The system, intended to be fair, might be or might be made to appear fairer still, but the roughness in justice does not, in my view, reach the point where the courts ought to intervene. I consider, therefore, that the tribunal is entitled to make its determination on the documents specified. But I would add two qualifications. The first is, that if the matter proceeds, the taxpayer should be entitled to see the counter-statement: certainly he should if an appeal goes to the tribunal under subsection (6), since it would be wrong that as an appeal body they should be in possession of a document which one side has not seen and I think the same should be done if the case goes to the special commissioners".

In ***Clough v. Supt. Greyson et al*** (1989) 26 J.L.R. 293, the appellant, whose firearm licences were revoked under the provisions of the Firearms Act, complained that the principles of natural justice were breached, in that the respondent had not given him the opportunity to be heard prior to

such revocation. The Court of Appeal affirmed the decision of the Full Court which refused the appellant an order of certiorari. The headnote reads:

> "**Held: (i)** wherever executive action is involved, the law requires the official to act fairly but that does not necessarily involve either hearing the person against whom the action is taken or giving him reasons for the action but rather that the official should act bona fide in accordance with the provisions of the statute and have a prima facie case for taking the relevant action;
>
> **(ii)** the Firearms Act did not impose on the first respondent any duty to afford the appellant an opportunity to be heard or to supply reasons to the appellant for his decision and the principles of natural justice were not breached by reasons thereof;
>
> **(iii)** any such hearing as was appropriate was available before the Minister;..."

Carey, J.A. said at page 297:

> "By Section 36 of the Act the appropriate authority is entitled to revoke the licence but that power is subject to a right of appeal to the Minister. It is at this point that the right to be heard operates, for by the Firearms (Appeals to the Minister) Regulations, the aggrieved party is able to present his side of the story. He is given no right to be seen but he must be heard. He can submit the grounds of his appeal. These regulations provide that the 'appropriate authority' must supply the reasons for its decision to the Minister. There is no requirement that the reasons should be supplied to the aggrieved party by the 'appropriate authority'. In my view, this is of significance for it shows that the statute does not intend that any hearing should take place before the 'appropriate authority' ...It is at the hearing before the Minister that attacks on the basis of illegality, irrationality and procedural impropriety can properly be pursued.
>
> As I pointed out in ***Virgo Enterprises Ltd. & Ors. v. Newport Holdings Ltd. & Ors,*** M.A. Nos, 1, 2 & 3/89 (supra), at p. 7:

> 'There seemed to be an underlying fallacy in the arguments advanced before us that there was unfairness because the application was made without affording the tenant an opportunity to be heard, granted that his contractual obligations as a tenant might be jeopardised. It may fairly be asserted that there is nothing inherently unjust in reaching a decision which has adverse consequences to one party in his absence. Typical examples are ex parte applications to a Court or an application to a Justice of the Peace for a warrant to arrest some person.'
>
> The Statute by allowing a hearing by the Minister, after revocation by another official, provided a procedure whereby the principles of natural justice, for example, reasons for the decision and a hearing, could be satisfied. I am quite unable therefore, to appreciate where the procedure in its setting operates unfairly to the holder of a Firearm User's Licence to the point where we are called upon to supply the legislative omission."

In the case of ***Century National Merchant Bank Ltd. et al v. Omar Davis et al***, P.C. Appeal No. 52/97 delivered March 16, 1998, the Judicial Committee of the Privy Council, in affirming the judgment of the Jamaican Court of Appeal, dismissed the argument of the appellants that the Minister of Finance was in breach of the principles of natural justice, in that the appellant banks were denied the opportunity to be heard prior to his decision to assume temporary management of the appellants. The Board (per Lord Steyn) referred to the words of Lord Reid in ***Wiseman v. Borneman*** (supra) at page 308,and continued at page 11:

> "For the reasons already explained their Lordships are satisfied that the statutory right of appeal to the Court of Appeal, exercising wide original jurisdiction, should be sufficient to achieve justice to the bank."

The cases do show that in some instances the statutory scheme may be so fashioned that fairness may be achieved by ensuring that the right to be heard is granted not by an appearance and oral representations at the earlier stage but by the grant of the opportunity for an appeal by the person affected by the decision, at a later stage.

In ***Lloyd v. McMahon*** [1987] A.C. 625, the district auditor had surcharged the Liverpool councillors with losses caused by their failure to raise a valid rate. They appealed to the High Court. Ultimately, the House of Lords on appeal, held that they had been given a fair hearing but even if it had been defective, it was cured by the full re-hearing of their case by the High Court. Lord Bridge maintained at page 709:

> "The scope of the statutory appeal was as ample as it could be and more ample than that of judicial review."

Lord Templeman said at page 716:

> "...a distinction was drawn between full appeals where all the evidence may be examined and limited appeals on questions of law only or where the appellate body does not investigate findings of fact."

The authors of ***Administrative Law*** by Wade & Forsyth, 7th Edition, said at page 547:

> "...an appeal may have greater curative effect where the appeal tribunal has original as well as appellate jurisdiction."

In ***Principles of Judicial Review*** by De Smith, Woolf & Jowell (1999), the authors commented at page 318:

> "A fair 'hearing' does not necessarily mean that there must be an opportunity to be heard orally. In some situations it is sufficient if written representations are considered. Where the words 'hearing' or 'opportunity to be heard' are used in legislation, they usually require a hearing at which oral submissions and evidence can be tendered. However, in a great many statutory contexts, a duty of 'consultation' is placed upon the decision-maker. This is almost always interpreted by the courts to require merely an opportunity to make written representations, or comments upon announced proposals."

The statutory scheme contained in the Town and Country Planning Act and the KSAC Building Act together provides a comprehensive method by which the machinery for the development of land is organized and sets out the procedure to be followed.

Section 10(1) of the KSAC Act requires that:

> "**10.--(1)** Every person who proposes to erect or re-erect any building or any part thereof, or to extend any building or any part thereof, shall give notice thereof to the Building Authority..."

Accompanying the notice should be:

> "**(a)** An accurate ground plan showing the land or site, the frontage line for length of twenty feet, of any building, whether standing or in ruins, adjacent on each side thereof, and the full width of the street or streets immediately in front and at the side or back thereof, if any.
>
> **(b)** An accurate plan showing the several floors of such building and the front elevation thereof and at least one cross section and such other cross or longitudinal sections and further particulars, as the Building Authority may from time to time by regulation or in any particular case require.

> **(c)** An accurate plan showing the frontage of such building on any street or lane."

The section goes on to detail the scale to which the plans should be drawn, the power of the Surveyor to approve the drawings and notify the builder or require amendments and the intervention of the Building Authority "...in case of dispute." The first proviso to the section prohibits the approval of any plan "...unless the class of building and the frontage, elevation and design are in the opinion of the Building Authority suitable to the locality and neighbourhood..." The proviso then refers to the requirement for "...sanitary arrangements...", deals with "house sewers" and then stipulates the continuing supervision of the Building Authority and the Surveyor, in regard to the "...approach ...of such working drawings or detailed plans." The second proviso reads:

> "Provided also that the Surveyor may in his discretion accept a notice unaccompanied by plans and approve of the building proposed subject to such written instructions or directions as may from time to time be given by the Surveyor or Building Authority..."

The Act, therefore, permits some degree of representation, by permitting an appeal at the early stage of the submission of the application. However, it goes on to recite the criminal sanctions if one seeks to commence a construction without permission retaining even then, an opportunity for alteration to effect compliance - a further right to be heard. Section 10(2) reads:

> "**10.--(2)** Every person who shall erect, or begin to erect or re-erect, or extend, or cause or procure the erection, re-erection or extension of any such building or any part thereof, without previously

> obtaining the written approval of the Building Authority; or, in case of dispute, of the tribunal of appeal, or otherwise than in conformity with such approval; and every builder or other person who shall, in the erection, re-erection or extension of any such building or part thereof deviate from the plan approved by the Building Authority; or, in the case of detailed or working drawings, by the Surveyor or the tribunal of appeal, shall be guilty of an offence against this Act, and liable to a penalty not exceeding fifty thousand dollars, besides being ordered by the Court to take down the said building or part thereof, or to alter the same in such way as the Surveyor shall direct, so as to make it in conformity with the approval of the Building Authority or the tribunal of appeal." [Emphasis added]

Despite the fact that the appellant had commenced its construction prior to January 1996, and only submitted its application on March 4, 1996, the Building Authority of the KSAC did consider the said application on June 19, 1996; a waiting period of three months. The detailed plans and drawings as required by section 10(1) of the KSAC Building Act were then before the said Authority assisted by its advisory panel of experts. There was, therefore, ample documentary representations by the appellant at this stage and there was no necessity then for an oral hearing. Fairness had been achieved.

The appellant also complains in ground 2 that there was no evidence before the Building Authority to support the refusal of its application. This latter ground, in the motion before the Full Court was framed and argued on the basis that the reasons given for refusal were invalid. Wolfe, C.J. said, on page 115 of the record:

> "There is no submission that there is no evidence to support the findings, rather, the submission is that the reasons given are invalid.
>
> I find the submission untenable in the light of the affidavits filed by the applicant and respondent. The findings are amply supported by the affidavit evidence of Blossom Samuels and Arnold White."

The affidavit of Arnold White does support this finding by the Full Court and, therefore, that aspect of grounds 1, 2 and 3 in relation to the consideration of the application before the Building Authority fails.

If the application for building approval is refused, as it was in the instant case, the Town and Country Planning Act grants to the appellant the right of appeal to the Minister, before whom the entire nature and substance of the appellant's application could have been advanced. The local authority (KSAC) would have had initially, statutorily, to have given a comprehensive consideration to the application. Section 11(1) of the said Act requires the local authority in considering the application to include specific areas in its deliberations. It reads:

> "**11.--(1)** Subject to the provisions of this section and section 12, where application is made to a local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto, and to any other material considerations."

If the application is refused, the right of appeal conferred by section 13 may be utilised. It provides:

> "**13.--(1)** Where application is made under this Part to a local planning authority for permission to

> develop land or where such application is referred to the Authority under the provisions of section 12, and that permission is refused by the local planning authority or the Authority, as the case may be, or is granted subject to conditions, then if the applicant is aggrieved by the decision so taken he may by notice served within the time, not being less than twenty-eight days from the receipt of the notification of the decision, and in the manner prescribed by the development order, appeal to the Minister: [Emphasis supplied]
>
> ...
>
> **(2)** Where an appeal is brought under this section from a decision of a local planning authority or the Authority, the Minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, or the Authority, as the case may be, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance.
>
> **(3)** Before determining any such appeal, the Minister shall, if either the applicant or the authority concerned so desire, afford to each of them an opportunity of appearing before and being heard by him."

The section clearly shows, that, on appeal, the appellant's application would have to have been treated as an original application, its plan and drawings would have been presented in support and it would have been able to make its oral submissions. This was the type of "ample statutory appeal more than judicial review", contemplated by Lord Bridge in ***Lloyd v. McMahon*** (supra) and which was held to have satisfied the right to a fair hearing.

In the instant case, the appellant chose not to appeal from the decision of the Building Committee of the KSAC given on June 19, 1996, refusing its application.

On the other hand, where it is apparent to the KSAC or the Government Town Planner that a development of land is commenced without the requisite permission, the said KSAC or Town Planner may serve on the offending owner or builder a notice under section 23(1) of the Town and Country Planning Act, called an enforcement notice. Section 23(2) reads:

> "**23.--(2)** Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, and in particular any such notice may, for the purpose aforesaid, require the demolition or alterations of any buildings or works, the discontinuance or any use of land, or the carrying out on land of any building or other operations and shall state that any person upon whom an enforcement notice is served is prohibited from continuing or carrying out any development or operations or using the land in respect of which the notice is served."

In these circumstances also, the statute grants to the person aggrieved the right of appeal to a tribunal, where all its complaints could be aired. Section 23A(1) reads:

> "**23A.—(1)** If any person on whom an enforcement notice is served pursuant to section 23 is aggrieved by the notice, he may within

> twenty-eight days of the service of the notice appeal against the notice to the Tribunal."

This statutory provision available also, negates any contention of deprivation of the right to a fair hearing.

In the instant case, the appellant did file an appeal on September 18, 1996, against the enforcement notice dated August 22, 1996. By letter dated September 18, 1996, to the appellant, it was advised by the Appeals Tribunal of the documents to be filed for the purpose of the appeal. These included "all relevant plans, drawings and particulars ...(and) copies of relevant correspondence (and) ...statements of facts relating to the appeal...". That appeal, as stated previously, was adjourned on November 6, 1996, in order to pursue judicial review, the basis of this appeal. The appellant has literally "walked away" from a right to a hearing given to it by statute and, curiously, complains of a denial of that very right! There was no denial of the right to a fair hearing.

Fairness is also challenged on the basis of a legitimate expectation on the part of the appellant due to the alleged statement by the said Arnold White that the application for building permission would have been granted. This principle has been firmly based since ***Council of Civil Service Unions v. Minister of the Civil Service*** [1985] A.C. 374. The relevant aspect of legitimate expectation would be, as Lord Fraser said, at page 401:

> "...an express promise given on behalf of a public authority."

The Full Court found that no legitimate expectation arose in favour of the appellant. Wolfe, C.J. said, at page 118 of the record:

> "I am of the view that the applicant can place no reliance upon anything which might have been said by the officers re the grant of permission."

and concluded at page 119:

> "In the instant case there was no such assurance or undertaking."

I agree with this conclusion of the Full Court. Whereas, a public officer can bind a public authority in some instances, in the instant case, the building surveyor White could not be expected to be binding the KSAC in circumstances where his alleged assurances would amount to an endorsement of the unlawful conduct of the appellant in commencing a construction without the required permission. Such conduct attracted criminal sanction under section 10(2) of the KSAC Building Act. In any event, it was found as a fact, on the available evidence, that no such assurance was given. I agree that no legitimate expectation arose in favour of the appellant. For these reasons, it is my view that grounds 1, 2 and 3 fail in their entirety.

Ground 4 complains that the refusal to give written approval was arbitrary and unreasonable. The arguments advanced were in relation to the application for planning permission heard by the KSAC Council on June 19, 1996. This was already dealt with in relation to ground 2 and aspects of grounds 1 and 3. For the same reasons expressed, this ground accordingly also fails.

Ground 5 is an argument that the enforcement notice was void in that it refers to a development order of 1996 which does not exist. The Full Court (per Wolfe, C.J.) said at page 123 of the record:

> "Dr. Barnett complains that the Enforcement Order cites 1966, whereas the Order was enacted in 1965 and therefore the notice is defective. The Town and Country Planning (Kingston)(Confirmed) Development Order, 1965 was published in the Jamaica Gazette Supplement, Proclamations, Rules and Regulations of Friday, July 1996. This error, I would regard as de minimis. Notwithstanding the error in the year there cannot be any doubt what legislation was being referred to."

I agree with this finding. The misquotation of the year of the development order "1996" instead of "1995" cannot, in the light of current thinking, be supported by the argument of "error on the face of the record." It must be considered in the wider context of ultra vires. The question is, whether or not the said issuance of the notice was within the power of the Town Planner. The said notice called the Enforcement Notice was issued in accordance with the provisions of sec. 23 of the Town and Country Planning Act. It recited the breach and stated the prohibition from carrying out any further development. The notice ordered the appellant to cease construction, demolish the building, remove the resulting rubble, and restore the land to its original state. The said notice reads:

> "THE TOWN AND COUNTRY PLANNING ACT
> CONTRAVENTION OF DEVELOPMENT ORDER
> ENFORCEMENT NOTICE
> (PURSUANT TO SECTION 23)
>
> TO: DELBERT PERRIER
> AUBURN COURT LIMITED
> OF: 15 SOUTH AVENUE, VOL. 1127 FOL. 105
> KINGSTON 10
>
> 1. WHEREAS you have contravened or caused a contravention of the Town and Country Planning (Kingston) Confirmed Development Order 1966.
>
> by erecting without permission on the land known as 15 South Avenue registered at Vol.

1127 Folio 105 of the Register Book of Titles, a building comprising ground floor plus one, using the existing southern perimeter wall and extending it upwards to form the southern wall of the said building in approximately the position marked X on the plan attached.

2. You are prohibited from continuing or carrying out any development or operation or using the land in respect of which this notice is issued.

3. YOU ARE HEREBY REQUIRED to take the following steps

   i] to cease construction of the building immediately from the date on which this notice takes effect.

   ii] to demolish the building being constructed within 7 days from the date on which this notice takes effect.

   iii] to remove from the land all building materials and rubble resulting from the demolition of the building within 10 days from the date on which this notice takes effect

   iv] to restore the land to its condition before the breach of erecting the building without permission within 14 days from the date on which this notice takes effect.

4. THIS NOTICE TAKES EFFECT, subject to paragraph 5 at the expiration of three (3) days after the date of service." (Emphasis added)

The date on which the said notice took effect and the time within which the requisite steps should be taken are in precise conformity with the provisions of section 23 of the Town and Country Planning Act. The notice

concluded with a recital of the penalty for non-compliance. The substance of the powers are definitively stated.

As I stated previously, the relevant development order was the Town and Country Planning (Kingston) Confirmed Development Order, 1995. It was published on July 22, 1996, in the Jamaica Gazette Supplement (emphasis added). The nature of the misquotation could not have deprived the Town Planner of the power she sought to and did in fact exercise. Nor would the appellant be unaware of the basis of the exercise of such power. I agree with the Full Court that this misquotation may be regarded as de minimis. There is no virtue in this ground.

The appellant's conduct was one of a persistent disregard for the law. It commenced and continued construction of the building on South Avenue knowingly without permission. It defiantly continued construction even after it was instructed to cease. Such conduct cannot be ignored by a court. The Full Court recognised its discretionary powers exercisable in consideration of the grant of the orders of certiorari and prohibition and declined to favour the appellant. This approach of the Full Court cannot be faulted. I agree with its conclusions.

For the above reasons, the appeal should be dismissed.

PANTON, J.A.:

I have read the draft of the judgment of my learned brother, Harrison, J..A. I agree with his reasoning and conclusion in relation to this matter. However, I wish to add a few words.

On the second day of the hearing of this appeal, counsel for the appellants, Mr. Rudolph Francis, in response to a question posed by Harrison, J.A., informed the Court that he had not seen any evidence in the record of appeal to indicate that there had been any previous conduct between Mr. Arnold White, the Chief City Engineer of the Kingston and St. Andrew Corporation and the appellant or Mr. Delbert Perrier that would have given rise to the doctrine of legitimate expectation. That concession meant that there were really only two issues for consideration and determination in respect of the appeal:

> (1) Was the appellant entitled to a hearing when the application for planning permission was being considered?
>
> (2) Was the notice dated August 22, 1996, a valid notice?

The submissions from the appellant on these two points took a further two days. I am at a loss as to why Mr. Francis' concession did not extend to the entire appeal as, in my view, there is no merit whatsoever in any of the grounds argued.

The conduct of the appellant amounted to a brazen, outrageous act of defiance of the statute law of our country. The relevant authorities acted with propriety and commendable appreciation of the law and procedures governing building applications. In my view, the reasoning and decision of the full court showed neither fault nor flaw. The behaviour of the appellant is worthy of nothing but condemnation, and cannot be supported in any way.

So far as the first issue mentioned above is concerned, I wish to refer to the opinion of the Judicial Committee of the Privy Council in the

Trinidadian case ***Rees and Others v Crane*** [1994]43 WIR 444 at 457 where Lord Slynn of Hadley said:

> "It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints latter, that the making of the inquiry without observing the *audi alteram partem maxim* is justified by the urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, and that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.
>
> But in their lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor deSmith puts it (see *Judicial Review of Administrative Action* (4th Edn) at page 199):
>
> > 'Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will *generally* decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, *particularly* he is entitled to be heard at a later'."

In the instant case, I agree with the submission of Mr. Lennox Campbell, Q.C. that the appellate procedure provided by the Town and Country Planning Act allows the appellant to appear and deal with all issues that would have been considered at the time of the consideration of the application.

There is no reason to disturb the decision of the Full Court. I agree with the dismissal of this appeal.

ORDER

DOWNER, J.A:

By a majority (Harrison, Panton, JJA); Downer J.A. dissenting:

(1) Appeal dismissed. Order in the Court below affirmed

(2) The agreed or taxed costs are to go to the respondent.