ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 516 OF 2000

In the Matter of the Town and Country Planning Act, No 45 of 1992 of the Laws of Saint Vincent and the Grenadines

And

In the Matter of an Appeal by Grenadines Services Limited from a Decision of the Town and Country Planning Appeals Tribunal

BETWEEN:

GRENADINES SERVICES LIMITED

Appellant

v

THE PHYSICAL PLANNING AND DEVELOPMENT BOARD
and
THE ATTORNEY GENERAL OF THE STATE OF SAINT VINCENT AND THE GRENADINES

Respondents

Appearances:

Grahame Bollers for the Appellant
Donald Browne, Mr Martin with him, for the Respondents

- -
2001: March 27, April 11
- -

JUDGMENT

[1] MITCHELL, J: This was a planning appeal brought against a decision of the Planning Appeals Tribunal of St Vincent and the Grenadines (hereinafter "the Tribunal") set up under the Town and Country Planning Act, No. 45 of 1992 (hereinafter "the Act"). The decision of the Tribunal was given in writing on 13 October 2000. The appeal before this Court was filed by a Motion on 23 November 2000. The argument took only two hours when it came up for hearing on 27 March. That was because both counsel had prepared

very helpful skeleton arguments and exchanged their authorities, for which the court was very grateful.

[2] Procedurally, this was quite an extraordinary case. The appeal was supposedly brought under the provisions of Section 27 (7) of the Act. The sub-section sets out the functions of the Tribunal. It provides:

> The Tribunal may, after making such inquiry as it may think fit and after giving the appellant a reasonable opportunity to present his case -
>
> (a) allow or dismiss the appeal;
>
> (b) uphold the decision of the Board;
>
> (c) reserve or vary the decision of the Board,
>
> and without prejudice to the right of an aggrieved party to the appeal to apply to the High Court for appropriate relief, every such decision shall be final.

The subsection seems clear. The decision of the Tribunal is final. This finality, the subsection says, is without prejudice to the right of any one of the parties to apply to the High Court for "appropriate relief". There is nothing otherwise in the Act that grants a right of appeal from the Tribunal to the High Court. In the absence of some authority in the Act or some other Act, the High Court has no jurisdiction to entertain an appeal from the decision of an administrative tribunal. That does not mean that the High Court may not intervene in the work of such a tribunal in suitable circumstances. The High Court has always had the authority to supervise the work of administrative tribunals. The High Court performs this role in the procedure known to lawyers as an Order of Certiorari. O.44 of the Rules of the Supreme Court 1970 governs the procedure to be followed on an application for an Order of Certiorari. When the new Civil Procedure Rules 2000 come into effect later this year, the procedure will be as set out in Part 56 of those rules. The present procedure, basically, involves applying by Summons to the High Court for leave to make the application, filing copies of a Statement and any supporting Affidavits, and, once leave has been granted, applying to the Court by originating motion for the Order of Certiorari. The application that is usually made is to bring up the decision of the tribunal and to quash it for having been made in excess of the jurisdiction of the tribunal granted to it by the relevant statute. That procedure was not followed in this case. Instead, a Notice of Motion purporting to be an Appeal pursuant to section 27(7) of the Act was filed.

Counsel for the Appellant assured the Court, when asked, that the Court had the jurisdiction to hear the Appeal. He had no authority for that assurance, other than that the High Court always had the inherent jurisdiction to supervise the decisions of administrative tribunals. Mr Martin, counsel for the Respondent, similarly assured the Court that it had jurisdiction under Section 27(7), and that the Court also had "inherent jurisdiction," to hear the Appeal. The Court was not satisfied for the reason above given that it had any such jurisdiction. If, instead, an application had been made by the Respondent to strike out the proceedings as having no authorisation or basis in law, that application would undoubtedly have succeeded. However, in the face of the submissions made by both counsel, and in the interest of minimising costs, the Court decided to treat the proceedings before it as an application for an Order of Certiorari, leave for which was granted, and proceeded to deal with the proceedings by consent even though the wrong procedure had been followed.

[3] Given the decision that the Court is about to make, it is not appropriate for the Court to make any finding on the disputed facts. It is necessary only to give the barest outline of the agreed facts so as to lay the basis for this decision. The principle and undisputed facts are not really complicated. By an indenture of 26 April 1976 the appellant's predecessor in title purchased 14,716 sq ft of land at Belmont on the island of Bequia from Belmont Estates Ltd (hereinafter "the Vendor"). This land was purchased subject to a number of restrictive covenants. Insofar as they are relevant, they provide that:

> 1 No trade manufacture business or commercial undertaking and no profession shall be carried on on any lot without the consent in writing of the Vendor.
>
> 2 Nothing shall be done on any lot that shall unreasonably interfere with the rights of owners or occupiers of other lots or which may be or become an annoyance or nuisance to the owners of any adjoining or neighbouring lots.
>
> 3 The surface . . .
>
> 4 No rubbish . . .
>
> 5 No earth closet . . .

All purchasers of lots from the Vendor were bound by and had the benefit of identical restrictive covenants as those set out above. The Appellant's lands were, thus, part of a scheme of development established by the Vendor. On 11 April 1996, the Appellant's predecessor in title had applied to the Physical Planning and Development Board (hereinafter referred to as "the Board") established under Section 3 of the Act for permission to construct a bakery on the said land. He had previously obtained a release signed by the Vendor's chairman. Permission to build and operate a bakery was duly granted by the Board. None of the adjoining property owners appear to have objected. By a Deed dated 11 April 1997 and registered as Deed 1145 of 1997, the Appellant acquired title to the land. The land was then mortgaged by the Appellant to the Caribbean Banking Corporation as security for a loan of $550,000.00, which was used by the Appellant to construct the bakery. The Appellant operated the bakery from mid-1997 until the month of July 1999. During this period, the Appellant also sold food items from the bakery. During the almost 2 years of operations, it was claimed by the Appellant, and not disputed, no threats of legal action were received from other lot owners on the building scheme. No lot owner sought to enforce the restrictive covenant against conducting commercial activity on the lot. On 19 November 1999, the Appellant applied to the Board for a change of use of the property. The appellant proposed to establish a Kentucky Fried Chicken outlet and a Gourmet Mini Mart in the premises. Some 15 persons objected, 3 of them owners of lots on the building scheme; the others are visitors who rent from 2 of those owners. They raised many objections, relating principally to noise, garbage, vermin, and the consequent, feared, fall in the values of their properties that they alleged would result from the American-style fast-food operation that was to be conducted from the Appellant's premises. They also raised the issue of the restrictive covenants that the Appellant had entered into in the deed referred to above.

[4] Section 17 of the Act sets out the matters that the Board should give consideration to when dealing with an application for permission to develop land. Some of these would also relate to an application for change of use. The section reads as follows:

> 17.(1) In dealing with an application for the grant of permission for development, the Board shall, so far as it is practicable to do so, give primary consideration to

(a) the approved national, regional and local plans, if any, prepared in accordance with the provision of this Act;

(b) the approved development plan applicable to the land to which the application relates;

(c) an approved environmental impact statement made pursuant to section 29 in respect of the application.

(2) In addition to the consideration referred to in subsection (1), the Board shall, in considering any application under subsection (1), take into account such of the following considerations as are in its opinion relevant to the application before it –

(a) any statement of policy issued by the Minister which is relevant to the application;

(b) any representation made by any department of government, or statutory Board;

(c) any representations made by any member of the public;

(d) any other material consideration.

(3) without restricting the generality of (d) of subsection (2), amongst the consideration which may be regarded as material are –

(a) the use of uses to which the land to which the application relates is being put at the time of the application;

(b) the pattern of development of the area where the proposed development is to take place;

(c) the likely impact on the environment of the area where the proposed development is to take place;

(d) possible alternative sites for the proposed development;

(e) whether any pollution, including pollution of the marine environment, is likely to be caused by the proposed development;

(f) any social costs and benefits to the community which are likely to be generated by the proposed development;

(g) where the application is for permission to subdivide land . . . [not relevant]

(h) the availability of water, electricity and waste disposal services.

The restrictive covenants in this case would have fallen to be considered by the Board under subsection (2)(d) as a material consideration. The letters from members of the public that were before the Board would have been relevant as "representations made by any member of the public."

[5] The Board considered the application of the Appellant for the requested change of use. On or about 14 March 2000 the Board refused the requested change of use. The reasons given by the Board were as follows:

(1) The proposed use to which the application relates will not be compatible with the sub-division whose predominant land use is for residential purposes only.

(2) The proposed development will impact adversely on the environment within the subdivision and the entire neighbourhood mainly by pollution in general – litter, noise, and the improper disposal of garbage with the inevitable breeding of rats, other rodents and insects.

(3) The proposed development has raised very strong objections and serious concerns by plot owners in the subdivision as such development would be in breach of the restrictive covenants entered into by them. Other members of the public have also registered strong objections.

(4) The proposed development will cause depreciation in the value of the properties in the sub-division and the rest of the neighbourhood.

[6] The Appellant subsequently appealed to the Tribunal. Extensive grounds of appeal were filed and argued. The grounds of appeal to the Tribunal consisted of some 30 legal-length pages, including appendices, site plans, floor plans, graphs, topographical surveys, elevations and drawings, drainage layouts, etc on the various approved forms. The hearing by the Tribunal began on 7 September 2000. The site was visited on 11 September 2000. The decision of the Tribunal dated 15 September 2000 reveals that the Tribunal heard "presentations" from Mr Grahame Bollers as counsel for the Appellant, Mr Brian Huggins as architect for the Appellant, Mr Donald Browne as counsel for the Board,

and Ms Elizabeth Mwakosya as Town Planner. No record of the actual proceedings before the Tribunal, the notes of evidence and of argument, other than the file before the Board and the grounds of appeal to the Tribunal, was made available to this Court. Counsel for the Appellant stated to the Court that major new evidence had been led before the Tribunal to establish that the noise, pollution and health and other planning concerns of the Board were misconceived. Counsel for the Appellant complained that the Tribunal did not deal with any of these planning-related issues in coming to its decision.

[7] On or about 15 September 2000, the Tribunal rejected the appeal and gave its reasons in writing. It was common ground in the argument before this Court that the only ground given by the Tribunal for rejecting the appeal before it was that the proposed commercial activity contemplated by the change of use application would amount to an infringement of the rights of the other lot owners in the development, and that the restrictive covenants could only be waived by a court of law. Counsel for the Appellant argued that the Tribunal had not performed its functions properly. In effect, he was saying that it acted outside of or in excess of its jurisdiction. The submission was, if I may paraphrase him, to the effect that the Tribunal constituted itself as a court of law solely for the purpose of determining the validity of the restrictive covenant; that the Tribunal was not legally qualified to assess the validity of the restrictive covenant or to adjudicate upon whether the restrictive covenant had legally been waived; that the finding by the Tribunal that the restrictive covenant could only be set aside by a court order, which had not occurred, was clearly wrong in law. Counsel for the Tribunal presented a counter-argument to the Court supported by a written brief and an extensive list of authorities. His entire written skeleton and oral arguments revolved around the effect and validity of the restrictive covenants described above.

[8] Because of the mistaken nature of the proceedings before this Court as conceived by both the Appellant and the Respondent, no argument or legal authorities relating to the law and practice governing an Order of Certiorari were produced to the Court for its assistance. All of the argument and authorities produced to the Court related to the validity, enforcement and waiver or discharge of restrictive covenants. This decision is, therefore, hampered in the Court having been deprived of any argument or legal authority on the usual certiorari issues. The fact that there was no record of the new evidence, nor

of the argument, before the Tribunal did not help either. This decision is, consequently, arrived at and is based on the most general of principles.

[9] The restrictive covenants in question constituted what has been described as a special local law relating to the area over which the scheme extended. Clearly, the Board and the Tribunal were entitled to take the covenants into account when coming to their respective decisions on the application for change of use. The enforcement *per se* of restrictive covenants is a matter solely within the purview of the Courts of this State. The Board and the Tribunal do not enforce restrictive covenants. Thus, it is conceivable that the Board and the Tribunal might approve an application for change of use because a proposed change is permissible within a development plan for a particular area. In spite of the planning permission received by a particular developer, that developer may be prohibited by the Court from putting the planning approval into effect because the proposed development contravenes some private right or contract such as a restrictive covenant. There is no contradiction or duplication involved in saying that a proposed development needs both planning permission and compliance with other, private, rights of third parties. Planning permission does not enforce private rights. Nor does it supersede private rights. Planning permission when granted does not permit something to be done that is otherwise prohibited by some contrary right outside of the purview of the planning laws. Especially where, as in this case, the applicant contended before the Board and the Tribunal that the restrictive covenants had been legally waived and no longer existed, it was incumbent on the Board and the Tribunal to consider the application purely from a planning perspective. The issue of the validity or otherwise of the restrictive covenants was not before the Board or the Tribunal. In the event, the Board proceeded to deal with the application principally on the basis that the proposed change of use infringed the restrictive covenants entered into by the applicant. The Tribunal decided the appeal before it solely on the basis of the presumed validity of the restrictive covenants. Neither the Board nor the Tribunal decided the application on purely town and country planning principles.

[10] In the circumstances, the only proper result is that the original appeal should go back to the Tribunal for the Tribunal to consider the appeal against the decision of the Board on purely town and country planning issues. The Minister should ensure that the Tribunal is differently constituted on this re-hearing of the planning appeal. Given the unsatisfactory

way in which this matter has been brought before the Court, the order will be that each party will bear its own costs of this application before the Court.

I D MITCHELL, QC
High Court Judge