

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. CV1102 of 2014

IN THE MATTER of the Administrative Justice Act Cap. 109B of the Laws of Barbados.

AND IN THE MATTER of the Application for Judicial Review of Enforcement Notice No. 141/2000 and Stop Notice Reference No. 1726/08/97.

AND IN THE MATTER of the Town and Country Planning Act, Cap. 240 of the Laws of Barbados.

AND IN THE MATTER of certain acts by certain Departments of the Government of Barbados in relation to the development of lands at Vacluse Estates, St. Thomas.

BETWEEN:

FRIENDS OF MOTORSPORTS INC.

APPLICANT

AND

THE CHIEF TOWN PLANNER

FIRST RESPONDENT

THE ATTORNEY-GENERAL

SECOND RESPONDENT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2014: October 08, 17

Mr. Vincent Watson, Mr. Derrick Oderson and Mr. Wilfred Abrahams for the Applicant.

Mrs. Deidre Gay-McKenna and Ms. Shanna Codrington for the First and Second Respondents.

DECISION

Introduction

- [1] By a fixed date claim form filed on 11 July, 2014, the Applicant is seeking to set aside an enforcement notice and a stop notice served fourteen years ago, on the Secretary of Vaucluse Estates Ltd., by the First Respondent. The application is for judicial review under the Administrative Justice Act, Cap.109B.
- [2] The Applicant seeks the following orders –
- (1) a declaration that both notices are unreasonable in all circumstances;
 - (2) an order of certiorari quashing the two notices as an unreasonable and unlawful exercise of administrative authority on the part of the First Respondent;

(3) such further and/or other relief as the Court may deem necessary and just; and

(4) that the Respondents pay the costs of the Applicant.

[3] The grounds on which relief is sought are that -

(1) the administrative acts or omissions of the First Respondent constitute an unreasonable and improper exercise of administrative authority in contravention of section 4 of Cap. 109B; and

(2) the Applicant has suffered loss and damage by reason of the unreasonable and improper exercise of administrative authority.

Background

[4] The Applicant is a company incorporated and registered as No. 18812 under the Companies Act, Cap.308. The Applicant entered into a land rental agreement with Vaocluse Estates Ltd., for the use of approximately 50 acres of land at Vaocluse Plantation ("the plantation"), for the purpose of motor sport and the cultivation of hay. The agreement commenced in January 2000, and continued on an annual basis.

[5] Pursuant to the agreement, motor rallies were held at the plantation utilising private cart roads on the plantation, and adjoining public roads. The Ministry of Public Works suspended the use of public roads for motor rallies around February 2000. Thereafter, it was expected that any motor rallies held at the plantation, had to be restricted to its private cart roads.

[6] At this time, some of the plantation cart roads were realigned by the Applicant to provide a self-contained rally circuit, and to prevent egress on to any adjoining public roads. Some cart roads were bulldozed and removed, and new cart roads were put in place. Other existing cart roads were realigned and incorporated into the new road layout for a race track.

[7] The Court accepts the unchallenged evidence of Gregory Cozier that:

“By our measurement in linear metres and not square metres, 1,500 metres of roads were removed, 1,000 metres retained, and 700 metres added. That gives us a net addition of 150 linear metres of road.”.

The First Respondent was unable to confirm or challenge these measurements.

[8] An existing bridge was also removed and rebuilt. The previous bridge consisted of a rubble stone wall structure that began to disintegrate. It was bulldozed and rebuilt in concrete. The Court also accepts Gregory Cozier’s evidence that the new bridge “is not substantially different from the previous bridge, other than the improved materials used.”. The new bridge was incorporated into the layout for the race track. The First Respondent informed the Court that he has no knowledge of the condition of the old bridge.

[9] Alarm bells went off at the Town and Country Planning department. A team from the planning department visited the site in July 2000, and submitted a comprehensive report. This report was not produced to the Court. Despite a “thorough search” the file with this report could not be found.

[10] As a result of the work carried out by the Applicant, the First Respondent issued the two notices, each dated 31 August, 2000. The enforcement notice stated that -

“The [First Respondent] in exercise of the powers conferred on him by subsection (1) of Section 33 of the Town and Country Planning Act, Cap. 240 and all other powers enabling him in that behalf, hereby gives notice that the development hereunder specified appears to him to have been carried out without the grant of permission or approval in accordance with the terms of the Town and Country Planning Development Order, 1972, namely:-

“The erection on land belonging to Vacluse Estates Ltd., situated at Vacluse adjoining lands of Vacluse Estates to the west, Hopewell Estates to the east, Vacluse Estates to the south and lands of Charles Edghill to the north in the parish of St. Thomas in this Island of:

- (i) Unauthorised engineering works and ancillary structures; and**
- (ii) Change of use of land from agricultural to race-track”**

and that the said development was carried out between June 2000 and August 2000 and being after the 14th April 1972 the date of the coming into force of the Town and Country Planning Development Order, 1972, and the

[First Respondent] hereby requires that the following steps be taken within twenty-eight (28) days from the date on which this Notice takes effect for restoring the land to its condition before the development took place, to wit:-

- “(i) The demolition and removal from the land of the said unauthorised works.**
- (ii) The cessation of the said unauthorised use, restoration of the soil and the regrading of the land”.**

This notice shall take effect on the expiration of twenty-eight days after the date of service thereof.

Your attention is drawn to the information set out on the back of this Notice.

Dated this 31st day of August 2000”.

[11] The back of the enforcement notice alerted the recipients and interested parties to the right to apply to the First Respondent for permission to retain the engineering works and ancillary structures. They were also made aware of the right to apply to the High Court to quash or vary that notice.

[12] The stop notice informed all interested parties that –

“The [First Respondent] in exercise of the powers conferred on him by section 40B(1) of the Town and Country Planning Act, and all other powers enabling him in that behalf, hereby gives notice prohibiting the carrying out or continuation on the land of the operations specified in the attached enforcement notice No.141/200 of..... being operations which appear to him to constitute

a breach of planning control or to be so closely associated therewith as to constitute substantially the same operations.

This notice takes effect from the date of service thereof.

Your attention is drawn to section 40B (5) of the Town and Country Planning Act.

Dated this 31st day of August 2000”.

[13] Between October 2000 and September 2008, three applications were made to the Town and Country Planning department in relation to the plantation. The first application, No.2363/10/00C dated 12 October, 2000, was submitted by the owner of the plantation, Vaocluse Estates Ltd. Permission was sought to retain 1682 metres of dirt road with berms, and the upgraded bridge, in order to facilitate agricultural and motor sport activity. Permission was also requested to allow the status quo to remain with respect to 1556 metres of bulldozed dirt roads. The First Respondent refused permission on 14 January, 2008.

[14] A second application, No. 2264/09/01C, was submitted by the Applicant on 12 September, 2001. The Applicant, as the lessee of the premises, sought a change of the use of the plantation from agriculture to motorsport. The second application was withdrawn by a letter issued by Richard Gill

Associates Limited, the agent for the Applicant, and dated 24 September, 2008.

- [15] The second application was replaced by a third, No. 2726/09/2008C dated 29 September, 2008. In this third application, the Applicant sought permission to retain berms, roadways and the upgraded bridge for motorsport and agricultural purposes.
- [16] The third application was processed by the First Respondent, and forwarded to the Minister with responsibility for Town Planning on 29 March, 2011. A hearing was conducted on 22 November, 2011, and the Applicant was represented at that hearing. To date the decision of the Minister is still pending. It is six years since this application was submitted to the Town and Country Planning department; three years and six months from the date of submission to the Minister; and two months short of three years since the hearing was convened.
- [17] By letter dated 22 August, 2013, IMG Motorsport wrote to the Minister of Tourism with a proposal to bring the World Rallycross Championships to Barbados, and to Vacluse, in November 2014, 2015 and 2016. This letter was copied, inter alia, to the Minister of Finance, who is also the Minister responsible for Town Planning. It appears that the deadline for confirming the availability of the plantation race track for these international

championships is immanent. However, the Applicant is unable to give this confirmation while the enforcement and stop notices are in effect, and the decision of the Minister is outstanding. Therefore, the Applicant urges the Court to grant the relief sought.

[18] Affidavits were submitted on behalf of the Applicant by –

- (1) Gregory Cozier, the Managing Director of the Applicant;
- (2) Michael Cozier, a shareholder in the company that owns the plantation;
- (3) Christine Toppin-Allahar, an attorney-at-law and physical planner; and
- (4) Richard Gill, a planning consultant.

The First Respondent, Mark Cummins, filed an affidavit on behalf of the Respondents. With the exception of Mrs. Toppin-Allahar, the persons who filed affidavits also gave oral evidence. Mrs. Toppin-Allahar's affidavit was accepted as evidence by the consent of the parties.

The Case For The Applicant

[19] The Applicant contends that the plantation was used for the dual purposes of motor sports and agriculture. Therefore, planning permission was not required for the development the Applicant carried out in 2000. Further, the work was permitted development, and did not constitute or involve a material change of use.

[20] The enforcement notice was said to be invalid by reason of its vagueness and uncertainty. And the First Respondent wrongfully exercised his discretion when he caused this notice to be issued. By extension the stop notice was also invalid.

[21] It was also argued that the Applicant should not be refused a remedy in judicial review proceedings, although it did not utilise the redress procedure in the relevant town planning legislation.

The Case For The Respondents

[22] Counsel for the Respondents submitted that the Court should not entertain a judicial review application for three reasons. First, the Applicant did not avail itself of the appeals procedure in the Town and Country Planning Act ("Cap. 240"). Secondly, there was inordinate delay in bringing the application. And thirdly, the application was premature, because no decision has as yet been made by the Minister.

[23] With respect to the work carried out by the Applicant, it was indeed development that required planning permission. The work resulted in a material change of use of the leased area from agricultural to motor sports. It followed that the enforcement and stop notices were not only valid, but still in force.

Dual Purposes And Mixed Use

[24] Section 14 (3) of Cap. 240 provides that –

“Where on the appointed day land is normally used for one purpose and was also used on occasions, whether at regular intervals or not, for another purpose, planning permission is not required for the use of the land for that other purpose on similar occasions.”.

[25] In **Chaderton v. The Chief Town Planner** ((1997) 33 BARB.L.R. 12), Payne J. considered sections 14 (1), (2) and (3) of Cap.240. In that case the Plaintiff sought to rebuild using the original foundation and existing walls of a building that had been partially destroyed by fire. The learned Judge observed that:

“These provisions seem to protect existing uses, and to recognise vested property rights. I see no authority under [Cap.240] to require the removal of buildings or structures which existed before the Act came into force.”. (P.14 of judgment).

For these reasons an enforcement notice was discharged by the Court.

[26] Gregory Cozier’s evidence was that it was to his knowledge and belief that car racing took place at the plantation prior to 1957. He described this use as a “documented historical fact”. This was confirmed by Michael Cozier. To his credit the First Respondent conceded the dual use of the plantation before Cap.240 came into force. He said –

“I accept that like most plantations, Vaocluse was used for rallying prior to 2000. I accept that there was a dual use for Vaocluse plantation for agriculture and motorsports prior to 2000. I accept that the dual use pre-dated the coming into force of [Cap.240].....I am familiar with the term user right. I accept that there was a user right with respect to Vaocluse for rallying.”.

- [27] The law has recognised that an occupier of land can use it for a number of unrelated and different purposes, none of which is ancillary to any other, and which are not confined to any particular location on the land. (See **Wipperman v. Banking LBC (1965) 17 P & CR 225**). In **Burdle v. Secretary of State for the Environment [1972] 3 All E.R. 240**, it was accepted that land may accommodate two or more activities, neither of which is ancillary to the other. The land is then described as having a mixed or composite use.
- [28] The Court has no difficulty in finding that prior to 08 July, 1968, when Cap.240 came into force, the plantation had two recognisable uses, agriculture and motorsport. The agricultural use was the primary or predominant use that occurred daily. The motor sports activity was conducted on a smaller scale, with a maximum of 6 rallies annually. The rallies took place on the plantation cart roads that were used to facilitate

agriculture; and up to the year 2000, adjoining public roads were also used for rallying.

[29] With the lease of 50 acres of the plantation land to the Applicant from January 2000, the agricultural and motor sporting activities were concentrated in the same area. These two activities enjoyed a symbiotic relationship. The unchallenged evidence of Gregory Cozier is that from 17 July, 2002 –

“Of the 700 acres of Vaucluse plantation, only the site that racing is carried out on is currently cultivated for agriculture, the growing of hay....The maintenance of the area for motor sports has sustained and considerably enhanced the remaining agricultural production.”.

[30] Michael Cozier also confirmed that at the plantation –

“No agricultural use is being practised now with the exception of the raceway. The area of the raceway is in hay production for livestock. The raceway is approximately 50 acres. The remaining acreage is approximately 700 acres. Only the 50 acres rented to the Applicant company is in agriculture and motorsports.”.

[31] There is then no question or issue that at the critical period in 2000, the plantation was subject to the mixed or composite uses of agriculture and motor sports. By 2002, both uses were concentrated on the 50 acres leased to the Applicant.

Alternative Means Of Redress

- [32] The Applicant conceded through its witness Richard Gill, a planning consultant, that the work it carried out in 2000 was development. However, the Applicant contends that arising out of the mixed use of the plantation land, that work benefitted both its agricultural and motor sporting pursuits on the plantation. The argument was that the development was in a class permitted by the Second Schedule to the Town and Country Planning Development Order, 1972 (S.I. 1972 No.75: “the Order”).
- [33] Indeed, Class IV of the Order exempts development for agricultural purposes. More particularly, the Description of Development at paragraph (2) of Class IV exempts –
- “The carrying out on agricultural land having an area of four acres or more and comprised in an agricultural holding of building or engineering operations requisite for the use of that land for the purposes of agriculture.....”.
- [34] Subject to the conditions expressed in Class IV (2) of the Second Schedule to the Order, the Applicant is saying that it did not require planning permission for its development work in 2000, because such development was for agricultural purposes. Quite apart from any question as to whether this exemption extends to the motor sport use because motor sport occupies

the same exempted agricultural area, the immediate challenge for the Applicant is sections 35 (1) and 70 (1) of Cap. 240.

[35] Section 35 (1) provides that –

“Any person on whom an enforcement notice is served, or any other person having an interest in the land, may, at any time within [the expiration of 28 days from the date of the service of the notice] and in accordance with any rules of court, appeal to a Judge in chambers against the notice on any of the following grounds

- (a) that planning permission has been granted for the development to which the enforcement notice relates;
- (b) that no planning permission was required in respect of that development or, as the case may be, that the conditions or limitations subject to which planning permission for that development was granted have been complied with;
- (c) that what is assumed in the enforcement notice to be development did not constitute or involve development;
- (d) that the enforcement notice was not served on the owner or occupier of the land within the relevant period of 4 years specified in subsection (2) of section 33;
- (e) that the requirements of the enforcement notice exceeded what is necessary for restoring the land to its condition before the development in question took place or, as the case may be, for securing compliance with the conditions or

limitations to which the enforcement notice relates;

(f) that the period specified in the enforcement notice as the period within which any steps required by that notice are to be taken falls short of what should reasonably be allowed.”.

[36] The question as to whether planning permission was required could have been brought to the High Court under sections 35 (1) (b) of Cap.240. The time for so doing has long gone. It expired 14 years ago. But, despite this lengthy passage of time, the Applicant implores the Court to resolve issues arising from the service of the enforcement notice, by way of judicial review.

[37] In this regard, section 70 of Cap.240 is also pertinent. That section provides that –

“(1) Subject to subsection (2), the validity of an enforcement notice which has been served under Part V on the owner and occupier of the land shall not, except by way of an appeal under section 35, be questioned in any legal proceedings whatsoever on any of the grounds specified in paragraphs (a), (b), (c) and (d) of subsection (1) of section 35.

(2) Subsection (1) does not apply to proceedings brought under subsection (5) of section 36 against a person who –

(a) had held an interest in the land since be-

fore the enforcement notice was served under Part V; and

(b) did not have the enforcement notice served on him hereunder; and

(c) did not, under section 35, appeal against the notice.”.

[38] The proceedings before this Court were not brought under section 36 (5) of Cap.240. Therefore, this exception does not apply to the Applicant. And section 70 (1) appears to contain a most emphatic prohibition against alternative legal proceedings outside of section 35. However, section 70 (1) does not extend to alternative legal proceedings where the issues mirror sections 35 (1) (e) and (f). Parliament did not include sections 35 (1) (e) and (f) within the scope of the prohibition against alternative proceedings found in section 70 (1).

[39] From this Court’s interpretation of section 70 (1), it appears that it is open to the Applicant to engage alternative legal proceedings, including judicial review, to argue that the requirements of the enforcement notice were excessive, and/or that the time specified by the First Respondent in the notice for taking remedial action was unreasonably short.

[40] The Court is also of the view that if the enforcement notice is being challenged on grounds not captured by sections 35(1) (a) to (d), the Applicant has the option of utilising alternative legal proceedings. Judicial

review proceedings may be one such option, where, for example, the Applicant is challenging the validity of the enforcement notice on grounds that, if successful, would render the notice a nullity.

- [41] With reference to similarly prohibitive statutory provisions in England, it is thought that the prohibition does not preclude a challenge to the validity of the enforcement notice on other grounds. The learned authors of Halsbury's Laws of England use the example of an enforcement notice alleged to be a nullity, and posit that -

“An enforcement notice is a nullity and thus devoid of legal effect if it is defective upon its face.”. (Fourth Ed. Reissue, Vol.46, para.22 and fn.9).

- [42] In **Miller – Mead v. Minister of Housing and Local Government [1963] 1 All ER 459 at 470**, Lord Upjohn in the Court of Appeal said that an enforcement notice would be a nullity if –

“On its true construction it was ambiguous and uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or in what respect it was alleged that he had failed to comply with a condition or, again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches.”.

[43] The Court surmises that in this case the Applicant is submitting that the enforcement notice is void. This understanding is based on the evidence of Mr. Gill, and questions put to the First Respondent in cross-examination.

[44] Victor Moore in “A Practical Approach To Planning Law”, (11th ed., 2010), reminds us that –

“Judicial review.....is not an ‘appeal’ from a decision of a public authority, but a review of the manner in which the decision is made.”. (Para. 19.127).

In this case the Applicant is challenging the process by which the First Respondent came to his decision to issue the enforcement notice, that is, the manner in which he exercised his discretion. The essence of this challenge is not contemplated by section 35 (1) of Cap. 240.

[45] The Court is of the view that the application for judicial review raises issues that are either outside of the purview of section 35 (1), or that were not forbidden by section 70 (1). Those issues are concerned with the manner in which the First Respondent exercised his discretion to issue the enforcement notice; whether the enforcement notice is a nullity; and the excessive requirements of the notice. All these issues are amenable to judicial review. In addition, there is no concomitant procedure in Cap. 240 for challenging the validity of the stop notice.

- [46] The Court accepts the fundamental tenet of the judicial review jurisdiction that, where an applicant has available to him an adequate alternative means of redress, a court should not permit the application to continue except in exceptional circumstances. This principle was confirmed in **Gaskin v. Attorney-General No. 1924 of 2005, H.C. B'dos (decision dated 31 July, 2007)**, and **Mount Six Mens Company Limited v. Chief Surveyor No. 274 of 1999, H.C. B'dos (decision dated 15 November, 2006)**. (See also **Ferguson and Galbaransingh v. Attorney General, No. CV 2006-2959, H.C.T.&T., 05 April, 2007**; and **Mahabir and Jadoonanan, No. 3574 of 2003, H.C.T.&T., 25 July, 2007**).
- [47] The Court recognises that the aspect of the Applicant's case, which concerns the excessive requirements of the enforcement notice, could have been brought before the High Court using the appeals procedure under section 35 (1) (e) of Cap. 240. Excessiveness in an unreasonable exercise of discretion, and a part of the application is already devoted to issues surrounding the exercise of discretion by the First Respondent. Therefore, this Court has no difficulty in entertaining issues properly arising under section 35 (1) (e) as part of this application. It would be convenient to so do, and it is in keeping with the overriding objective of the Supreme Court (Civil Procedure) Rules, 2008, ("the CPR").

[48] The Court heard submissions from both sides relative to the question of whether planning permission was required by the Applicant. This Court does not propose to treat directly with that issue, or to deliver a decision thereon. But two observations will be made. The first is that the Second Schedule to the Order does not appear to address the mixed usage of land, where the usage is concentrated in the same area, and where one of the uses is not mentioned in that schedule. However, it does not follow, necessarily, that the use not mentioned can hide in the shadow of another use caught by the Second Schedule.

[49] The second observation is that one of the conditions for the exemption of land in agricultural use is that –

“The [First Respondent] shall be notified in writing of the date on which it is proposed to commence any building or engineering operations to which this permission relates and all proposed work shall be properly set out for inspection by that Officer or his representative prior to the commencement of work.”. (See Class IV, condition (5), and Standard Conditions 4 to the Order).

Had the Applicant adhered to the requirements of this condition, the First Respondent would have been aware of the state of the land and the extent of the work proposed, prior to the execution of the work.

Delay

[50] The Administrative Justice Act (“Cap.109B”), permits a court to refuse relief in certain circumstances. Section 8 states that –

“The Court may if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administration.”.

A similar provision exists in Part 56.5(1) of the CPR.

[51] One author has observed that “The issue of delay has a particular resonance in the planning context where the pressure is to complete the financing and delivery of the project in question.”. (See Frances Patterson QC, “Judicial Review: Law and Practice”, 2011 at p.133 para. S.41). Patterson further stated that –

“As ever there have been exceptions to a tight application of the time limits. In the case of **R v Bassetlaw District Council, ex p Oxby [1998] PLCR 283** the Leader of Council applied to judicially review a decision on the part of his own council some two years after the grant of planning permission. The Court of Appeal held that the legitimate interests of the land owners with the benefit of planning permission were not prejudiced by delay in mounting the application. ‘If anything in the extraordinary circumstances of the case the proceedings had been brought in the name of good administration’. The case of **Usk**

Valley Conservation Group v. Brecon Beacons National Park Authority [2010] EWHC 71 quashed a planning permission granted on 21 June 2005 when proceedings were not commenced until 05 February 2009 where the fact that the permission was invalid and should in principle be quashed, absent strong contrary reasons which did not exist, was decisive. That is to be contrasted with the case of **Gavin v. Haringey LBC [2003] EWHC 2591** where a claim to quash a planning permission granted some two and a half years earlier was dismissed due to the very harsh effect that would have on the developers.” (P.135 para.5.51).

[52] Counsel for the Respondents submitted that the application should be dismissed because of the intervening period of 14 years after the service of the enforcement notice. In **Judy Lloyd v. Attorney General No. 979 of 1996, H.C. B’dos. (decision dated 31 July 2004)**, Kentish J. did not dismiss an application delayed by 6 years and 9 months. The learned Judge found that this case stood on its own particular facts. Mrs. Lloyd had suffered “very grave and substantial” harm. Therefore, granting her relief did not open the floodgates for similar applications, and would not be detrimental to good administration.

[53] This case too stands on its own peculiar facts. The Applicant has invoked other procedures under Cap.240 in an effort to circumvent the enforcement and stop notices. At least two applications were submitted to the First Respondent for permission to retain the works. The First Respondent and

associated authorities have been equally dilatory in processing these applications. The first application had a gestation period of just over 7 years prior to the refusal of permission. And the more recent application has been 6 years in the making, with no decision as yet communicated to the Applicant.

[54] Another consideration is that since 2000, the persons whose interests are directly and adversely affected remain the same. The Applicant is still the lessee on the same 50 acres of plantation land, and the lessor is the same company that owned the land in 2000. There are no new interested parties; and there is no evidence of substantial hardship to, or substantial prejudice to the acquired rights of third parties.

[55] Any immediate hardship or prejudice will be felt by the Applicant, the plantation owner and the First Respondent. The direct effect of the enforcement notice is that the Applicant has been unable to conduct rallies on the leased land for a number of years. There is no income generated from this activity to drive the agricultural use of the land. The Applicant cannot host local or international events at Vaocluse, until the enforcement notice is lifted, or the most recent application for planning permission is approved. The international events have implications at the national level for the generation of foreign exchange, and the tourism related international

exposure of Barbados. Therefore, the Applicant feels compelled to use all available legal means, to restore motor sport to Vaucluse.

[56] The Court cannot deny the possible prejudice to the First Respondent, occasioned by the hearing of the matter 14 years after the enforcement notice was served. If the enforcement and stop notices are discharged, the First Respondent will be unable to serve another enforcement notice. Section 33 (2) (a) of Cap. 240 prohibits the service of an enforcement notice after 4 years from the carrying out of the development. But this was a possible outcome even if the Applicant had appealed the notice under section 35 (1). The Court takes judicial notice of the fact that, even after the implementation of the CPR in 2008, there was no guarantee that a final decision would have been delivered within 4 years from the date of service of the enforcement notice.

[57] The overwhelming hardship and prejudice are at the doorstep of the Applicant and the plantation owner. It must be noted that a subsisting enforcement notice is akin to a permanent injunction. (S.42 Cap. 240). And once the notice takes effect, it becomes a charge on the land when registered by the First Respondent. (S.74 (2) (b) Cap. 240). Therefore, in the same way that persons whose interests are affected may, over time, make multiple applications to the First Respondent for the retention of unauthorised works,

so too should they be able to invoke the supervisory jurisdiction of the court when appropriate.

[58] There is nothing in the affidavit or oral evidence of the First Respondent that hints at or suggests that, if the Court entertains this application, it will be detrimental to good administration. And nowhere in his counsel's written or oral submissions was the Court informed how good administration would be compromised.

[59] It is true that the First Defendant told the Court that the file containing the report, on which the decision to serve the enforcement notice was based, has been misplaced. But that is not evidence of detriment to good administration. All files associated with the enforcement notice, and with the subsequent planning applications, should be active and not dormant files. They are part of an ongoing continuous saga between the parties from 2000 until now.

[60] For the foregoing reasons, the Court considers it appropriate to hear this application for judicial review, despite the lengthy delay.

The Enforcement Notice

[61] Section 33 of Cap. 240 stipulates that –

“(1) Where it appears to the [First Respondent]

(a) that any development of land has been carried out without the grant of planning

permission required in that behalf in accordance with Part IV.....

then, subject to any directions given by the Minister, and to the following provisions of this section, the [First Respondent] if he considers it expedient to do so having regard to the provisions of the development plan and to any other material considerations, may,.....serve a notice under this section (in this Act referred to as an enforcement notice).

(2).....

(3).....

(4) An enforcement notice

(a) shall specify the development which is alleged to have been carried out without the grant of planning permission as mentioned in paragraph (a) of subsection (1).....; and

(b) may require such steps as may be specified in the notice to be taken, within such period as may be so specified, for the purpose of restoring the land to its condition before the development took place.....and in particular may, for that purpose, require the demolition or alteration of any buildings or works, the discontinuance of any use of land or the carrying out on land of any building or other operations.”.

These provisions speak to the basis on which the First Defendant may exercise his discretion to issue an enforcement notice, and to determine whether and how the land should be restored to its original condition.

[62] Another relevant provision is section 13 (1) of Cap. 240, which defines “development” in these terms –

“For the purposes of this Act, the expression “development”, subject to this section, means the carrying out of building, engineering, mining or other operations in, on, over or under any land, the making of any material change in the use of any building or other land or the sub-division of land.”.

This definition subsumes three categories of land development, namely operations, material changes in use, and sub-divisions.

(1) The Exercise Of Discretion

[63] The gravamen of the application is that both the enforcement and stop notices are “unreasonable in all the circumstances”. The concept of unreasonableness was formulated by Lord Greene in **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] KB, 223** as follows –

“...we have heard in this case a great deal about the meaning of the word “unreasonable”. It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He

must exclude from his consideration matters that are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority....In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”. (P.229).

[64] Further distillation of the grounds for judicial review are to be found in the “immortal maxim” of Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service [1985] 1 AC 374**. (See Patterson Q.C., *supra*, p.3 at para.1.1). Lord Diplock said in this case that –

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call “illegality”, the second “irrationality” and the third “procedural impropriety”....By irrationality I mean what can now be succinctly referred to as “**Wednesbury unreasonableness**”....It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.”. (P.410).

- [65] The first ground on which relief is sought is the unreasonable and improper exercise of administrative authority by the First Respondent. It is section 4 (e) of Cap.109B that allows the Court to grant relief against “unreasonable or irregular or improper exercise of discretion”. What then is the evidence that the First Respondent’s decision to issue the enforcement notice was manifestly unreasonable?
- [66] Interestingly, except for a question put to the First Respondent in cross examination by counsel for the Applicant, there is nothing in the affidavit or oral evidence from the Applicant’s witnesses alleging that the First Respondent’s decision to issue the enforcement notice was unreasonable. Counsel for the Applicant suggested to the First Respondent that he failed to do sufficient investigation on which to base the exercise of his discretion. This was denied.
- [67] The evidence of the First Respondent was that before the notice was issued, a team from his department visited the plantation in July 2000. A comprehensive report was compiled, and it is on the basis of this report that the enforcement notice was issued. This is the report on the missing file. According to the First Respondent—

“Based on their expert opinion and consulting section 13 of [Cap.240], it was agreed that the work carried out constituted development, and the enforcement notice was served on that basis.”.

[68] On behalf of the Applicant, Mr. Gill conceded that the work carried out was development. The dispute between the parties, and outside the remit of this Court, is whether that work constituted development requiring planning permission. This Court is of the view that the First Respondent had enough information before him to conclude that there was development under the first limb of section 13 (1). His team had sight of a racing circuit with associated engineering works, realigned roads, berms and a reconstructed bridge. It was open to the Applicant, under section 35 (b) of Cap, 240, to challenge the decision that planning permission was required.

(a) Material Change Of Use

[69] There may be an issue as to whether it was reasonable for the First Respondent to decide that there was a material change in use from agriculture to motor sports. He testified that the work was –

“.....certified as a material change of use based on the report which was submitted as a result of site visits, and observing roads which were realigned at that time in 2000. Hence the reason for serving the notice for a material change in the use of land....The change of use was based on the material change in the substantive use, which was agriculture, to form part of the reconfigured racing circuit.”.

[70] However, when the notice was served, the First Respondent had no knowledge of the amount of land that was removed from agricultural use to

motor sport activity. When he gave his evidence, he was still unable to independently verify the area of land that agriculture had lost. The only available figures came from the Applicant's witnesses, stating that approximately three quarters of an acre of additional agricultural land was absorbed by the race track. The net addition of land to motor sport was 150 linear metres of road.

[71] In **Birmingham Corporation v. Minister of Housing and Local Government** [1963] 3 All ER 668, Lord Parker CJ held that whether there was a material change of use was a matter of fact and degree in each case. In this matter there was no evidence to suggest that the additional land absorbed by the race track was significant when compared with what existed before; or when compared with the 50 acres leased; or when compared with the total area in agricultural production in August 2000. The Court is guided by the evidence of Gregory Cozier that Vacluse plantation abandoned its agricultural pursuits in 2002. But when the enforcement notice was served, sugar cane and ancillary rotation crops were still being harvested.

[72] Other indicators of a material change of use are a change in the character of the land, or an intensification of an existing use. In his affidavit, the First Respondent referred to the escalation and intensification of the motor sport use, as informing his decision to issue the enforcement notice.

“8...the use of motor sports escalated and went beyond the cart roads sometime after June 2000 and August 2000. Essentially, the site originally consisted of a network of cart tracks. However, these were rearranged to create a new network of dirt tracks for car racing accommodation. Hence, the service of the Enforcement and Stop Notices.....

18.....the escalation and intensification of the development referred to in the Enforcement Notice which was noted between June 2000 and August 2000 constituted development.”.

[73] However, in his oral evidence the First Respondent explained that his affidavit was not referring to an increase in motor sport activity at the plantation. Rather, escalation –

“.....speaks to the cart roads that were realigned to form a racing circuit, and, as I pointed out earlier, the reconstructed bridge. It was not my intention in using the word “escalated” to refer to the expansion of motor sporting activity itself. I have no evidence that there was an increase in motor sporting activity at the time of serving the enforcement notice.”.

[74] A material change of use of land can occur through intensification of the existing use. In **Birmingham** (supra), it was held that the question is whether the existing use has intensified to such a degree that it has become materially different from what it was before. (See also Robert Duxbury, “Telling & Duxbury’s Planning Law and Procedure”, 14th ed., 2009 at p. 164

para.6.128 – 6.130, and **Peake v. Secretary of State for Wales (1971) 22 P &CR 889**)

[75] There was no evidence of increased motor sporting activity in August 2000. And it is debatable whether the character of the land changed, given that agriculture continued in the same area. All the roads, whether new, extinguished or realigned, may be described as dirt roads. The berms, which were used as a security device to separate racing cars, were also constructed from dirt. The bridge when rebuilt remained in the same place with the same specifications. The only change in the construction of the bridge was the materials used. And the First Respondent accepted that the new, realigned and existing roads, and the bridge, continued in agricultural use.

[76] The First Respondent did not allege that the use of the race track involved a substantial increase in the burden of services supplied to the leased land. This would have been indicative of a material change of use. (See **Guilford RDC v. Penny [1959] 2 All ER 111**).

[77] Duxbury (*supra*), is of the view that –

“Since planning control is to some extent concerned with the preservation of amenity, it may also be relevant to ask what effect a change of use will have on the neighbourhood. A change of use may well be ‘material’ if the nature of the use as changed is such that it is likely to involve a great increase in the number of persons calling at the premises or if it is likely to cause a great deal of

noise.”. (P.166 para. 6.137-6.143; and see **Williams v. Minister of Housing and Local Government (1967) 18 P&CR 514**, and **Blum (Lilo) v. Secretary of State for the Environment et al [1987] JPL 278**).

- [78] There is no evidence that the realigned track caused increased activity on the plantation, or that it negatively affected adjacent and surrounding neighbourhoods to a greater degree than occurred prior to its construction. The First Respondent has not satisfied the Court that the complaints received by the First Respondent were indicative of either increased activity, increased traffic, or increased noise, on or around the plantation. No material change of use was proved in this regard. The First Respondent also accepted that the race track did not change the landscape at the plantation.
- [79] The Court is of the view that, on a balance of probabilities, there was no material change of use from agriculture to motor sport in 2000. However, even if the decision by the First Respondent, that there was a material change in use, was unreasonable, the Court again emphasizes the fact that material change of use is only one limb of development under section 13 (1). The Court has already determined that the First Respondent had enough evidence before him to find that there was other development within section 13 (1) on which he could reasonably issue the enforcement notice.

(b) Excessive Requirements

[80] The enforcement notice demanded the “demolition and removal from the land of the said unauthorised works”. To date, all that the Applicant has done is to destroy the berms. There is uncertainty and confusion regarding the removal and restoration of the bridge. The town planning team that visited the site in July 2000 noticed that work had been carried out to the bridge.

[81] In this regard, the evidence of the First Respondent gives some insight into the reasons for requesting the demolition of the bridge. He informed the Court that –

“A bridge was in that position prior to 2000. I do not know the dimensions of the bridge prior to 2000. I believe that a replacement of a stronger bridge with the same dimensions.....constituted development. I accept that the bridge was used for the purpose of agriculture.....one cannot look at a bridge in isolation from the network of roads which comprised the motor racing circuit.....The bridge was not seen or considered as a stand alone entity.... I am not saying that the roads were not being used for agriculture. They were. Our focus was on the realignment of the roads and the construction of the bridge to form a circuit.... The bridge followed the lines of the original bridge....In our estimation, the bridge was reconstructed for the express purpose to facilitate motor racing with agricultural vehicles also using it.....The benefit of demolishing and restoring the bridge is to the fulfilment of the enforcement notice for the removal of works to the bridge. It would be the

extinguishment of a reconfigured racing circuit. The benefit would be to stop a reconfigured racing circuit which the [First Respondent] felt constituted development....”.

[82] Although the bridge formed part of the race track, it was not the original bridge. The unchallenged evidence of Gregory Cozier was that the former bridge was a rubble stone wall structure, not made of soft stone. Efforts were made to save that structure, but it started to disintegrate. It was then bulldozed and rebuilt in concrete.

[83] It was not disputed that the bridge was rebuilt to the original specifications, and from a more durable material. The First Respondent did not contradict the Applicant’s witness that the bridge continues to be used for agriculture. There was also a letter before the Court dated 24 September, 2008, that was sent by Mr. Gill to the First Respondent. (See Exhibit RG1). In that letter Mr. Gill informed the First Respondent –

“...the reconstructed bridge, is essential to provide access to the hay pastures on the eastern side of the property and also required for the safe, physical separation of racing vehicles.”.

[84] Mr. Gill’s assertion about access to the eastern hay pasture could easily have been confirmed when the team visited the plantation in July 2000. There is nothing in the evidence that contradicted Mr. Gill. The bridge also sits on one of the retained and realigned roads, as shown in a diagram presented to

the Court. The First Respondent told the Court that there would be no benefit in removing the paving from the realigned road because “it follows the alignment of the existing cart track.”. But he was unable to extend the same argument to the bridge, that is, that the new bridge followed the same specifications as the previous bridge.

[85] The Court finds that, in these circumstances, the request for the removal of the bridge was excessive and an unreasonable exercise of the First Defendant’s discretion. What is more, any directive to remove the bridge, and replace it with a bridge, is irrational to the extent described by Lord Diplock in the **Council of Civil Service Unions** case (supra). It is a decision that defies logic.

(2) Validity Of Notice

[86] The Court referred earlier to the basis on which an enforcement notice would be considered a nullity, and to the guidelines in the case of **Miller-Mead** (supra at para.[42]). In the context of this case, the notice is a nullity if the Applicant was unable to tell how it was alleged to have developed the leased land, due to the ambiguity or uncertainty of the notice. The notice is also a nullity if the Applicant could not tell “with reasonable certainty” the steps required to remedy any alleged breaches.

[87] Duxbury explains that –

“What had to be decided in each instance was whether, in light of the surrounding circumstances, the recipient of the notice was sufficiently and clearly apprised of the effect of the notice, and of what he had to do pursuant to it to render it just or unjust to hold him to it.” (Supra at p.372, para.12.60).

[88] Similarly, Moore mentions the case of **Mackay v. Secretary of State for the Environment [1996] JPL 961**, where it was held that for an enforcement notice to be a nullity, the notice has to be defective on its face. (Supra, p.407 at para.21.78). Moore contends that –

“This would occur, for example, if a person could show that the notice failed to specify the date on which it was to take effect; failed adequately to state the matters alleged to constitute the breach; failed to identify the land affected; failed to specify the steps required to be taken to remedy the breach as occurred in **Tandridge DC v. Verrechia [2000] PLCR 1 (CA)**; or failed to state a compliance period.”. (Supra).

[89] When one reads the enforcement notice, it is immediately obvious that there are no specifics with respect to the breach alleged or the remedial work required. It is really the evidence of the First Respondent that fills in the gaps some 14 years later. The notice assumed that the Applicant knew the particulars of the alleged breach, and what was required to remedy the breach.

[90] Indeed, the evidence of Mr. Gill is telling. He spoke about his inability to get specific information from the town planning office. Counsel for the First Respondent suggested to Mr. Gill that, in his September 2008 letter to the First Respondent, the statement that “several of the engineering works to which the Enforcement Notice applied were removed” was an admission that the Applicant knew what the alleged breaches were and how to remedy those breaches. Mr. Gill responded that –

“I had a major problem in ascertaining what works the [First Respondent] was seeking to have removed. I concluded that the works were mainly berms which separated the cars that would use the dual track, and these appear to me to have been removed. In the absence of any information from the [First Respondent] I assumed this is what the enforcement notice might have related to.”

[91] And in re-examination Mr. Gill continued –

“When I enquired at the planning office no one could define specifically what works were required to be removed. I had a meeting with two senior persons at [the planning department] and they would not or could not state specifically what the enforcement notice related to. Mrs. Paula Smith and Mr. Ivor Downes were the persons I spoke to....The enforcement notice was general in description. It did not state specifically the works that were offensive to the [First Respondent].”

[92] By October 2000, the first application for permission to retain the work was forwarded to the First Respondent. That application referred to 1556 metres

of dirt road that were extinguished; 1682 metres of dirt road that were established; and to the upgraded bridge. The First Respondent suggested that this application, following so soon on the heels of the enforcement notice, was proof that the notice was not vague or imprecise.

[93] With respect, while the Applicant, through its officers and agents, may have had an idea of what the notice was referring to, the fact that Mr. Gill was forced to seek guidance from the planning department, is testimony to the uncertainty created by the notice. The Court noted that the renewed application in September 2008 sought permission to retain berms, roadways and an upgraded existing bridge. None of the works mentioned in these two applications were referred to in the enforcement notice.

[94] The evidence of the First Respondent supplied the details missing from the enforcement notice. At paragraph 8 of his Affidavit the First Respondent confirmed that –

“The Enforcement Notice related to the extinguishment of approximately 1556 metres of dirt road, to the establishment of 1682 metres of dirt road with berms, and to the upgrading of an existing bridge.”

This information was not contained in the notice, and appears to have been lifted from the first application for permission to retain the works. The berms and the upgraded bridge would have been obvious to the departmental

team that visited the area in June 2000. Yet they are not mentioned in the notice.

[95] The First Respondent admitted that the details at paragraph 8 of his affidavit were not in the notice. But he maintained that the notice covered the area where the development took place. It also appears that, when the First Respondent gave his evidence in this Court, the Applicant's representatives were hearing for the first time that –

“There would be no benefit in removing paving from the [upgraded roads], in that it follows the alignment of the existing cart road.”.

This points to genuine uncertainty on the part of the Applicant as to the details of the alleged breach, and as to the extent of the restoration work required. To this day there is understandable confusion on the part of the Applicant about the request to remove and rebuild the bridge.

[96] The Court finds that the enforcement notice did not contain the degree of specificity necessary to apprise the Applicant about the alleged unauthorised engineering works and ancillary structures. The evidence also indicates that the Applicant was unable to determine with reasonable certainty what was required to remedy the alleged breaches. Given the fact that when the work was carried out it was believed genuinely that planning permission was not required, it was incumbent upon the First Respondent to detail precisely in

the enforcement notice the offending works and the restorative and/or demolition works required. Having not done so, the enforcement notice is invalid and a nullity. And it follows that the stop notice is also invalid.

Disposal

[97] The Court grants the following orders –

- (1) a declaration that the enforcement notice issued to the Applicant dated 31 August, 2000, is invalid;
- (2) a declaration that the stop notice issued to the Applicant dated 31 August, 2000, is invalid; and
- (3) an order of certiorari quashing the enforcement notice and the stop notice.

[98] The Court will hear the parties further on the question of costs and any ancillary orders.

Addendum

[99] This matter was filed on 11 July, 2014, together with a certificate of urgency. It was certified by the Honourable Chief Justice on that same date as not urgent, but that it should be given an early date. The file reached this Court for the first time on 23 September, 2014.

[100] The Court wishes to record its appreciation to counsel for the parties for their herculean efforts in agreeing to and ensuring that this case was fast

tracked to a speedy trial on 08 October, 2014. In particular I must mention the ancillary Court staff Mr. Patterson Boyce, Court Clerk, and Mr. Ryan King, Marshal II, for willingly returning to Court on the night of 08 October, 2014, to ensure that the trial could be completed. The preparation of this judgment was greatly enhanced by the judicial assistant and the secretarial staff. The Court thanks you all.

Sonia L. Richards
DR. SONIA RICHARDS
Judge of the High Court