IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.371/83

Set I

H.C.F.J.c

BETWEEN C. G. ROWLAND LIMITED a duly incorporated company having its registered office at Hamilton

Appellant

A N D THE NGARUAWAHIA BOROUGH COUNCIL a body corporate under the provisions of the Local Government Act 1974 having its registered office at Ngaruawahia

Respondent

Hearing: 4th April, 1984.

Counsel: R. S. Garbett for Appellant.
~~S. Thwaite~~ S.A. Fowler for Respondent.

Judgment: 27-5-84

JUDGMENT OF TOMPKINS, J.

The Appellant has appealed against an injunctic granted against it in the District Court at Hamilton on the 8t August, 1983, pursuant to s.92(2) of the Town and Country Planning Act, 1977 ("the 1977 Act").

In September, 1970, the Appellant purchased a residential property at Ngaruawahia. It was, at that time, in a run-down condition. He and his family lived in the hou He also, shortly after acquisition, commenced to use the property for a caravan hire business. For that purpose caravans were stored and displayed on the front of the sectio It was not a full-time business. In his affidavit of the 2n December, 1982, filed on these proceedings, he said that ther

The Respondent's first district scheme became operative in September, 1972.

The Appellant, when he commenced using the land for the purpose of the caravan hire business, had not sought the consent of the Council pursuant to s.38A of the Town and Country Planning Act, 1953 ("the 1953 Act"). In 1975 the Respondent communicated to the Appellant complaints concerning the Appellant's activities. As a result the Appellant was advised to make an application to the Respondent for consent to depart from the operative district scheme by using the front yard of the property for the hire and storage of caravans. This it did. The Respondent refused its consent on the grounds that "it is contrary to the provisions of the town plan and would be contrary to the amenities of the area".

From that decision the Appellant appealed to the Town and Country Planning Appeal Board (as it then was). By a decision given on the 30th August, 1976, the Board found:-

> " Having considered the evidence and the submissions, the Board finds that from a strict planning point of view the use should be conducted in a light industrial or commercial zone. There is some detraction from amenities and the use does have some slight adverse effect on the efficiency of SH1. If the use did not already exist on the Appellant's land, the Board would not be inclined to give consent to the application. To authorise a new non-conforming use would have considerable planning significance. "

However, the Board also accepted that the business was only part-time and that it was likely to remain so in the relatively small community of Ngaruawahia. It felt that to require the

It considered that a limited consent would come within the limitations imposed by s.35(2)(a) of the 1953 Act. It therefore allowed the appeal to the extent that the Appellant was authorised until the 30th June, 1981, to depart from the provisions of the district scheme by using part of the land for the hire and storage for hire of caravans upon certain conditions and limitations set out in the decision.

This the Appellant did. But it then continued to use the land for the same purpose after the 30th June, 1981. As a result, after certain correspondence and the service of a notice on the Appellant, the Respondent commenced proceedings in the District Court at Hamilton seeking an order pursuant to s.92 of the 1977 Act that an injunction issue against the Appellant to restrain it from continuing to use the property for the purpose of hirage and storage for hire of caravans.

The learned District Court Judge in his decision considered the contention advanced on behalf of the Appellant that the consent of the Council under s.38A of the 1953 Act was not required because the use to which the Appellant put the land when he commenced operating the caravan hire business was not a use that detracted or was likely to detract from the amenities of the neighbourhood. The learned District Court Judge considered that that issue had been determined by the finding contained in the decision of the Town and Country Planning Appeal Board, and that it was not appropriate for him to reverse that finding. He therefore held that the appropriate course was to allow the Appellant to make an application under s.153 of the 1977 Act seeking a declaration that the use was permitted under s.90 of the 1977 Act (the existing use section). He therefore granted the injunction in the terms sought, but ordered that its operation be deferred

were filed by the Appellant, the injunction was to be further deferred pending the decision of the Planning Tribunal. However, the Appellant elected not to adopt that course but rather to appeal to this court against the orders made in the District Court.

The proceedings to which this Appeal relates were brought pursuant to subss.(1) and (2) of s.92. They read:-

> " (1) Every person commits an offence against this Act who, otherwise than as authorised by or under this Act, after a district scheme or any part or provision of it becomes operative, uses or permits to be used any land or building in a manner that is not in conformity with the scheme or any part or provision of it as in force for the time being.
>
> (2) The Council in whose district the offence has been committed may, in respect of a continuing offence (whether or not a conviction has been entered in respect of the offence) apply to the High Court or, if the capital value as appearing in the district valuation roll of the property concerned does not exceed $50,000, to a District Court for an injunction to restrain the continuance of the offence. "

It was common ground that the Appellant's land, being zoned residential, the use of that land for the hirage or storage for hire of caravans, was not in conformity with the district scheme that became operative in September, 1972, nor would the reviewed district scheme which became operative on the 1st December, 1981.

The Appellant contended that the use was an existing use authorised to continue by s.90 of the 1977 Act, the relevant parts of which provide:-

(a) the use of that land or building -

(i) was lawfully established before the district scheme or the relevant part or provision of it became operative; and

(ii) is of the same character, intensity and scale as, or of a similar character, intensity and scale to, that for which it was last lawfully used before the date on which the district scheme or the relevant part or provision of it became operative; or

(b) . . . . "

It was again common ground that the use to which the Appellant had put the land was of the same or similar character, intensity and scale to that for which it was used before September, 1972, being the date on which the district scheme became operative. The issue was whether that use was lawfully established before that date.

This in turn involved the application to the circumstances of this case of subs.(1) of s.38A of the Town and Country Planning Act, 1953. That subsection reads:-

" (1) Except with the consent of the Council no use of any land or building that is not of the same character as that which immediately preceded it, shall be commenced by any person after the date of the commencement of this section and before the date when the relevant district scheme or section thereof becomes operative, and no such use having been so commenced shall be continued by any person in any case where the use detracts or is likely to detract from the amenities of the nighbourhood. "

The Appellant accepted that the use of the land for the hirage and storage for hire of caravans was not of the same character as the use which immediately preceded that use.

likely to detract from the amenities of the neighbourhood.

One further statutory provision requires consideration. S.153 of the 1977 Act makes express provision for issues such as this to be determined by the Planning Tribunal. It reads:-

" 153.(1) On application to the Tribunal in that behalf by the Council are by any owner or occupier of land affected, or on application made in the course of any proceedings under this Act, the Tribunal may declare whether any specified use is a use permitted by the district scheme for the land referred to in the application or proceedings before the Tribunal, or whether any specified use in relation to that land is permitted under s.90 or s.91 or Part V of this Act.

(2) Before making any such declaration the Tribunal shall require the applicant to give notice of the application to such persons as in the opinion of the Tribunal are directly affected by the application and not already parties to the proceedings. "

I return now to a more detailed consideration of s.92(2) of the 1977 Act. Its predecessor - s.36 of the 1953 Act - has been held to be penal in nature by the Court of Appeal in Stewart Investments Ltd. v. Invercargill City Council (1976) 2 N.Z.L.R. 362. In Wellington City Corporation v. Chan (1977) 1 N.Z.L.R. 705, it was accepted that the Council must discharge the onus of establishing the commission of a continuous offence before an injunction can issue. Further, it appears from what was said in the Court of Appeal in Potter v. East Coast Bays Borough, 5 N.Z.T.P.A. 26A, that a high degree of proof is required. Wild, C.J. said at p.264 that the Boroug had to establish the commission of an offence and that proof to the standard of a criminal prosecution was therefore required. Richmond, J. at 269 referred to the high degree of proof required.

a Council that considers a land is being used otherwise than as authorised by the Act has two alternatives. It can prosecute the person responsible under s.92(1), or it can seek an injunction under s.92(2). The latter course would frequently be favoured by a Council as being the more effective remedy. However, in either case in my view the same prerequisite is required, that is, proof by the Council that the person concerned has committed an offence - in the case of an application for an injunction under subs.(2) that offence must be a continuing offence. In either case, in my view the Respondent is required to prove all the essential elements of the offence to the standard required in a criminal prosecution. There is no doubt that the use was not in conformity with the scheme. The real issue, as I have already stated, was whether the use was lawful as an existing use pursuant to s.90 and that in turn depended upon whether the use was lawfully established before the scheme became operative. On whom did the onus of proof lie? Was it for the Respondent to prove that the use was not lawfully established, or was it for the Appellant to prove that it was?

In submitting that the onus was on the Appellant to prove that the use was lawfully established, that is, that the Appellant had existing use rights, counsel for the Respondent referred to J. H. Tutbury Ltd. v. Brereton (1976) 2 N.Z.L.R. 697. The appellant had been convicted under the 1953 Act for using premises in a manner not in conformity with the district scheme. Cooke, J., in delivering the judgment of the Court of Appeal, did not have cause to deal expressly with the onus of proving existing use rights. However, he said at p.703 -

" The present conviction does not estop the

However, I note that earlier on that page there is reference to the finding of the learned Judge in this Court that he was satisfied that there was evidence on which the Magistrate was entitled to find that the use of the premises detracted or was likely to detract from the amenities of the neighbourhood. Approaching the finding in that way is certainly consistent with the onus resting on the prosecution.

The general rule is that the onus rests on the prosecution to prove every ingredient of the offence. It has been said that this burden is subject only to the defence of insanity and to any statutory exception (Woolmington v. Director of Public Prosecutions (1935) A.C. 462). In R. v. Edwards (1975) 1 Q.B. 27, a further exception was stated by the Court of Appeal in England. The defendant had been convicted of selling intoxicating liquor without a licence. It was submitted on his behalf that the prosecution should have proved the absence of a licence. After a detailed review of the authorities, Lawton, L.J., delivering the judgment of the Court, said at p.39 -

> " In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes, or with specified qualifications, or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception the Court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the

Lawton, L.J. emphasises at p.40 that, under those circumstances -

> " What shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden. "

The Court therefore concluded that it was for the defendant to prove that he was the holder of a licence, not the prosecution to prove that he was not.

I do not consider that that exception applies in the present case. S.92 makes it an offence to use land not in conformity with the district scheme otherwise than as authorised by the Act. S.90 authorises land to be used in a manner that is not in conformity with the district scheme if the conditions of the section are fulfilled. In my view, on a proper construction of s.92, an essential ingredient that the prosecution is required to prove is that the use is "otherwise than as authorised by or under this Act". Therefore the prosecution must prove that the use is not, in a case such as the present, authorised by s.90. And that would require the prosecution to prove that the use was contrary to s.38A of the 1953 Act. Therefore, the Respondent, when seeking an injunction under s.92(2), must prove the same.

This approach is certainly consistent with s.153. Not only an owner or occupier but also the Council has the right under that section to obtain a declaration from the tribunal whether any specified use is permitted under s.90. Thus a Council, contemplating the seeking of an s.92(2) injunction, and recognising that the onus rested on it to prove that the use was otherwise as authorised by the Act, would [illegible]

so required, that the use that preceded the scheme becoming operative was one that detracted or was likely to detract from the amenities of the neighbourhood. However, in the present case the Respondent did not adopt that course. It placed no evidence before the Court designed to establish that the use detracted or was likely to detract from the amenities.

It was the view of the learned District Court Judge that the lawfulness of the existing use had been decided by the Town and Country Planning Appeal Board in that part of its decision to which I have already referred where the Board referred to some detraction from the amenities. He considered that that amounted to a finding for the purposes of s.38A of the 1953 Act that the use detracted or was likely to detract from the amenities of the neighbourhood. I do not consider this to be so. The Board was not concerned with whether or not s.38A had been complied with. The issue before the Board was whether the Appellant should be granted consent to depart from the operative district scheme. This was an application brought under s.35 of the 1953 Act. The criteria for the granting of consent set out in subs.(2) does not require a determination as to whether the proposed use detracts or is likely to detract from the amenities of the neighbourhood. Further, that application came before the Board in 1976. But a use is authorised by s.90 of the 1977 Act if it was lawfully established before the district scheme became operative, which in the present case was some four years earlier, i.e. in September, 1972. That was a question that the Board did not decide.

It is my conclusion that at the hearing in the District Court the Respondent failed to establish an essential

the injunction is set aside. This, of course, would not prevent Respondent from again seeking an injunction, assuming the burden of proving the absence of existing use rights. In the present case, since this issue is clearly such a controversial one, the Council may well be advised to satisfy that burden by seeking a declaration under s.153.

In the District Court the learned District Court Judge considered that in view of the circumstances there should be no order for costs. The ground upon which this appeal has been allowed was not raised by the Appellant in the District Court, nor for that matter in this Court until in the course of argument. It was for that reason that I allowed the parties to file further submissions on that point. It is also for that reason that I make no order for costs in this Court.

Solicitors:

McKinnon, Garbett & Co., Hamilton, for Appellant.

O'Shea & O'Shea, Ngaruawahia, for Respondent.

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