IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

6/9

C.P. 991/91

1620

IN THE MATTER of the Town and Country Planning Act 1977

BETWEEN	FUNERAL DIRECTORS (AUCKLAND) LIMITED
	Plaintiff
AND	OREWA FUNERAL HOME LIMITED
	First Defendant
AND	RODNEY DISTRICT COUNCIL
	Second Defendant

Hearing: 23 July 1991

Counsel: N.J. Carter and Miss J. Caldwell for plaintiff
G.M. Harrison for first defendant
R.W. Worth and Miss Young for second defendant

Judgment: 6 August ~~July~~ 1991

JUDGMENT OF BARKER J

The plaintiff has been operating the business of a funeral director out of premises in Tamariki Avenue, Orewa for some years. It seeks an interim injunction restraining the first defendant from continuing to operate a funeral parlour from premises situated about 500 metres away, at 39 Riverside Road, Orewa. At the hearing, without opposition, the above name of the first defendant was substituted for 'Murray Brown Funeral Home Ltd', the name

in which the proceedings were instituted.

The plaintiff's and the first defendant's premises are both situated within the district of the second defendant ('the Council') which is charged under S.62 of the Town & Country Planning Act 1977 ('the Act') with administering the Town Planning Scheme for the Rodney District. The plaintiff further seeks an injunction against the Council to prevent it breaching its duty to administer the District Scheme by allowing the first defendant to operate the funeral parlour without planning consent.

Although this is an interim injunction application, the facts are not in dispute and are in fairly short compass. They revolve around the use to which the first defendant's site has been put over the years and whether the first defendant has "existing use rights" in terms of S.90 of the Act.

In 1972-3, Orewa was part of the former Waitemata County. Through subsequent local body reorganisations it became, first, part of the Rodney County and, more recently part of the Rodney District. The relevant records of the former Waitemata County are apparently either lost or extremely difficult now to locate. The meagre information available indicates that, in June 1972, Waitemata County granted conditional use planning consent to the Jehovah's Witnesses' Church to "build a hall for religious purposes" on the first defendant's site.

A letter dated 19 June 1973, from the Waitemata County to the Jehovah's Witnesses' representative shows that the Council had approved the erection of a hall on the site, subject to a number of conditions relating to off-street parking, site location and building details. The Court has no evidence about: (a) the provisions of the District Scheme under which conditional use consent was given by the Waitemata County; (b) the documents lodged in support of the planning application by the Jehovah's Witnesses.

Under the present operative District Scheme of the former Rodney County (now Rodney District), the first defendant's site is zoned 'Residential 2'. Under a proposed review of this District Scheme, the site is to be zoned 'Residential 3A'. A Church is a permitted use under both schemes. A funeral chapel or parlour is not a predominant use under either. Funeral chapels are not a use defined in the operative District Scheme but there is a definition of 'funeral parlours' in the proposed review District Scheme.

After their Church was built in 1973, the Jehovah's Witnesses used it as a place of worship. According to information provided to the Council by the first defendant's town planning consultant, on every day of the week, some 5-30 people attended with greater numbers on other days and some 140 on Sunday mornings. There were official Church gatherings on Tuesdays, Wednesdays and Thursdays. The Church was also used on other occasions,

such as weddings, funerals and memorial services.

Early this year, the Jehovah's Witnesses decided to sell the property and move to new premises. The first defendant became interested in purchasing the property for use as a funeral home. It instructed a Town Planning consultant, who received advice from the Council that use as a funeral home would be permitted on the site, provided no embalming took place and no more than 10 funeral services per week were held. In the light of that advice, the first defendant concluded its purchase from the Jehovah's Witnesses and made minor internal alterations to the building. It then commenced to use the site as a funeral chapel. Its purchase was concluded before any complaint had been received from the plaintiff.

The planning department of the Council prepared a report for the Council summarising the history of the use of the premises by the Jehovah's Witnesses, recording the first defendant's proposal to operate a funeral chapel from the premises and evaluating that proposal in terms of S.90 of the Act. The Council accepted the planner's recommendation that the Council acknowledge to the first defendant that existing use rights applied to the use of the Jehovah's Witnesses' Church as a funeral parlour, provided that no embalming took place on the site and no more than 10 funerals occurred in any week.

The report offers the following reason for acknowledging

existing use rights: "the Council considers that the Jehovah's Witnesses' Church was lawfully established and the use of the Church as a funeral chapel (which does not include the embalming of bodies and entails no more than 10 funerals in any one week) would be of a similar scale, character and intensity to that of the existing church operation". This decision was communicated to the first defendant's planning consultant on 30 January 1991.

The first complaint from the plaintiff was a letter from its solicitors to the first defendant's planning consultant dated 15 March 1991, following the solicitors' earlier request for information from the Council. The plaintiff's solicitors wrote to the Council on 28 March and 3 April 1991 asking it to enforce its District Scheme and to take injunction proceedings against the first defendant for using the premises other than in conformity with the Act. The Council replied on 5 April 1991, stating that, as a result of a legal opinion, it considered that the first defendant's use of the premises was lawful in terms of S.90(1)(c) to the extent that the present use of the Church for funerals was authorised by the 1972 consent. No reference was made to S.90(1)(a), although the wording of the Council's advice of 30 January 1991 was in terms of S.90(1)(a).

The first defendant commenced operations on the site on 27 March 1991. It painted and renovated the Church and installed a flexifold door within the chapel itself. A

door was installed from the foyer into an office. A flexifold door was installed to divide the chapel into a room containing 84 seats and a lounge; the room can thus be opened out to provide a 150 seat chapel, if required. The public assembly licence permits seating for 160 people.

The first defendant has operated in accordance with Council's ruling. The embalming and technical side of the business is contracted out to established funeral directors in central and southern Auckland. It has undertaken 66 funerals since commencing operations; only 12 of these have been conducted from the chapel on the site, the others having been conducted from other churches, crematoria etc. That means an average of less than one funeral per week from the chapel site.

Mr Rowe, one of the two principal shareholders of the first defendant, deposed that he and his fellow shareholder did not proceed with the purchase of the site until they had been assured by the Council that funerals could be conducted there. The first defendant purchased the site for $205,700 and arranged a mortgage for $90,000.

If the injunction sought by the plaintiff were granted, the first defendant would be severely affected; it might be unable to meet its mortgage commitments; it might have to cease trading and to dismiss its employees. The plaintiff estimates that it will lose half its business

because of the existence of the first defendant's business; it contemplates loss of several hundred thousand dollars a year. The plaintiff operates 8 funeral parlour businesses from separate establishments in Auckland.

Determination of whether the first defendant's use of land is lawful requires a consideration of S.90(1), the relevant parts of which read as follows -

> "**Existing use may continue -**
>
> (1) Any land or building may be used in a manner that is not in conformity with the district scheme or any part or provision of it as in force for the time being if -
>
> (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;
>
> . . .
>
> (c) The use is pursuant to an application granted under this Act or the Town and Country Planning Act 1953 either before or after the date on which the district scheme or the relevant part or provision of it became operative."

Despite the second defendant's letter indicating that it considered the first defendant was entitled to rely on S.90(1)(c), Mr Worth submitted that S.90(1)(a) was applicable. It is therefore necessary to consider both

limbs. Counsel agreed that S.90(1)(b) had no application.

Mr Carter for the plaintiff, submitted that the opening words in S.90(1)(a) "the use of that land or building" changed their meaning according to which sub-paragraph applies. This submission is supported by the following dicta from various decisions of the Planning Tribunal.

(a) In Graham v Christchurch City Council (1983), 9 NZTPA 449, 452 the Tribunal presided over by Judge Sheppard said -

> "Nevertheless we have reached the conclusion, with respect, that the construction preferred by the Tribunal in the decisions cited was correct. It is evident that the words "The use of that land or building" in the introductory part of para (a) are to be read as the opening words of both subparas (i) and (ii). When they are read as introducing subpara (i), they clearly refer to a past situation, one which existed before the district scheme became operative. However, when they are read as the opening of subpara (ii), they cannot refer to the same past situation, because that subparagraph calls for a comparison to be made with that past situation. To make sense of that subparagraph, the opening words must be read as referring to the use which is to be compared with the past situation. They must refer to the use which is the subject of the consideration of whether it qualifies as an existing use authorised by S.90 of the Act, being a use which, in terms of the introductory part of subs (1), is "not in comformity with the district scheme".
>
> We conclude therefore that, although the words "The use of that land or building" are to be read as part of both subparas (i) and (ii), they do not bear the same meaning in both cases. The meaning changes according to the subparagraph being read. When read with subpara (i) they refer to the use which existed at the specified time in the past. With subpara (ii) they refer to the use which is the subject of the consideration of whether or not it is authorised by S.90. That use may be the

same use as that which existed at the specified time in the past, or it may not be the same. What is necessary is that it meet the conditions specified in subpara (ii), which involves a comparison with the use that existed in the past, and which itself must have met the conditions specified in subpara (i)."

(b) In Auckland City Council v Avondale Congregation of Jehovah's Witnesses (A.40/87, 10 June 1987) the Tribunal presided over by Judge Turner said -

"This part of S.90(1) gives rise to some difficulties of interpretation. But we see a clear legislative intention to give protection to the present use of a property in a case where the actual use of a property has changed from the use "for which it was last lawfully used before the date..." However, the present use must be of the same or of a similar character, intensity and scale to the use "for which it was last lawfully used before the date..."

Counsel for the City Council asserted that for the purposes of deciding the question before us, the "date on which the district scheme or the relevant part or provision of it became operative" is the date in 1981 when the current review of the scheme became operative. (The point is of some importance because it was also asserted that the use of the premises by the Lodge had decreased in intensity and scale over the last 20 years and that the use by the present owner is at a much greater intensity and scale than the use in 1981). We reject the contention. When the district scheme became operative in 1961, the use of the property became a conditional use. That is the time when planning consent was first required if the use was to be brought into conformity with the district scheme. No planning consent was sought. The state of affairs has continued ever since i.e. the status of the use as a conditional use and the lack of a planning consent. We hold that for the purposes of deciding the question before us, the relevant date is the date in 1961 when the district scheme first became operative."

(c) In Birkenhead Returned Services Club (Inc) v Birkenhead City Council (1983) 9 NZTPA 179, 180 the

Tribunal presided over by Judge Treadwell said -

> "The effect of subpara (ii) [of S.90(1)(a)] is that if the Club is to be entitled to the declaration which it seeks, it must demonstrate, inter alia, that the use of the clubrooms as they are proposed to be extended would be of the same or similar intensity and scale to that for which the land or building was last lawfully used before the date on which the relevant provision of the district scheme became operative.
>
> There was some difference between counsel concerning the date which should be adopted for the purpose of applying that provision. Counsel for the Club submitted that it should be 1980, being the year in which the use ceased to be a predominant use under the district scheme. But counsel for the Resident's Association contended for 1970, consistent with his submission that the use was not in conformity with the district scheme even when it was first established on the site in that year.
>
> Reading subpara (ii) with the introductory words of subs (1), we hold that the comparison called for by that subparagraph is to be made with the state of affairs which existed at the time when the provision of the district scheme with which the use in question is not in conformity became operative. There is no relevant provision of the district scheme which became operative in 1980. The significant event of that year for present purposes ws the public notification of the second review of the district scheme. However that has not yet become operative; it merely has the interim protection afforded by S.75.
>
> Whatever was the position in 1970, the provision of the first reviewed district scheme was designated the War Memorial Park as "open space - existing" became operative in 1973. We hold that the use for clubrooms is not in conformity with that designation."

Counsel for the Council referred to another decision of the Tribunal, this time presided over by Judge Skelton: C. Williams & Sons Limited v Christchurch City Council (C.75/88, 16 December 1988). This decision referred to the opening words in S.90(1) as referring to the currently

operative district scheme. This view is correct and does not alter the view of the subsequent part of the section indicated in the other decisions quoted above.

Having considered the Tribunal dicta quoted above, with which I am in respectful agreement, I hold -

(a) An 'existing use' of the site as a Church was lawfully established by a conditional use planning consent granted in 1972 or 1973 by the Waitemata County;

(b) An 'existing use' cannot have been established before the district scheme which rendered it a non-conforming use became operative; otherwise, there would have been no necessity for the 1972-3 consent;

(c) S.90(1)(a) is inapplicable to the present situation; it applies only when the district scheme making the use non-conforming came into effect after the use had been established;

(d) For S.90(1)(a) to apply the existing use must have been lawfully established at time when the provision of the scheme which rendered the existing use non-conforming became operative.

I agree with the interpretation placed on the section by

the three experienced Planning Judges quoted above. S.90(1)(a)(i) and (ii) refer to a time before any district scheme became operative. Support for this interpretation comes from a reading of S.90(1)(c) which covers the case where there had been some kind of planning consent under an earlier manifestation of the district scheme.

I therefore reject the submission that S.90(1)(a) applies. Even if I were wrong it is difficult to see how the 'character, intensity and scale' of the use of premises as (a) a funeral chapel with or without an office, and (b) the focus of the first defendant's business, can be of the same character as the use of the premises for (i) divine worship; (ii) the daily assembly of at least some of the church's adherents; and (iii) weddings, funerals and other gatherings outside of normal services. The previous use was religious or non-commercial, the present use has commercial overtones.

Mr Worth is right to submit that there is no expert planning evidence before the Court on the issues of 'character', 'intensity' and 'scale', and that the word 'character' because of S.2(2) must be construed with regard to the effect of the use on the amenities of the neighbourhood. Moreover, one need do no more than to compare the two uses in order to hold that the plaintiff has established as a 'serious question to be tried', that the character of the use by a commercial funeral director

for funeral services is not the same or similar to the character of the use by a Church body for assembly of the faithful, divine worship and other Church activities, including occasional funerals.

Having considered that the first defendant has no existing use right under S.90(1)(a) I turn now to S.90(1)(c). Again there is help from a decision of the Planning Tribunal in Churtonleigh Holdings Limited v Lower Hutt City Council (unreported, 23 May 1985) where a Tribunal presided over by Judge Treadwell had this to say about S.90(1) -

> "S.90(1) has three subsections, (a), (b) and (c). These three limbs of S.90 are disjunctive and were discussed in Permilltreat Timber Ltd v Hastings City Council Appeal 458/84. Briefly, if a use has been commenced pursuant to S.90(1)(c) it is not a use within the meaning of S.90(1)(a) and subsequent character intensity and scale is not relevant. If a use commenced pursuant to a planning consent lapses, then further notified applications are required and a subsequent operator cannot claim similarity of purpose. This is logical because the provisions of subs.(a) are intended to protect uses which were in existence without benefit of planning consent and therefore cannot be arbitrarily terminated. The category of uses in (c) are those established when planning controls were in force. There is a grey area between the two subsections if the provisions of S.38A of the 1953 Act are considered because it may be argued that a consent granted under that former section relating to land use controls before a scheme became operative may apply to subs.(a) as relating to a use lawfully established before the District Scheme became operative. However subs.(c) refers to uses granted pursuant to an application either before or after the date upon which the District Scheme became operative."

There is a serious question established that the first defendant's use of the site as a funeral parlour is not

the same as the use right given to the Church in 1972. Consequently, there is no existing use entitlement.

The plaintiff has at least made out a 'serious question to be tried'. Indeed on the information available to the Court, the plaintiff has gone a long way towards establishing what would be necessary for a perpetual injunction. If there is no existing use right available to the first defendant under S.90(1), it is difficult to see what other information could affect the situation between interlocutory and permanent injunction.

Counsel for the defendants submitted, rather tentatively, that the plaintiff, as a trade competitor, had no standing to seek an interim injunction. I reject that submission. Attorney-General v Birkenhead Borough (1968] NZLR 383 and City South Supermarket Ltd v J. Rattray & Sons Limited (1984) 10 NZTPA 207, 210 make it clear that a person claiming to be affected by a breach of a district scheme can seek an injunction to enforce the scheme without the necessity of joining the Attorney-General as relator. Moreover, the Planning Tribunal observed in Pokeno Motors (1977) Ltd v Franklin County (1980) 7 NZTPA 105 -

> "It is proper to protect businesses that conform with zoning from competition from those that do not."

In the City South Supermarket case, Holland J held that a trade competitor had standing to enforce the public law because of claimed economic loss. All that is needed is to establish a special damage of a nature greater than that or different from damage suffered by members of the public at large.

I myself dealt with the question of locus standi in Van Duyn v Helensville Borough (1984) 5 NZAR 55, 59-60. Many of the authorities there collected support the present plaintiff's claim to standing.

It was further submitted for the defendants that, in the exercise of its discretion, the Court should not grant an injunction because there existed other remedies in the Act available to the plaintiff. S.62(3) places a duty upon the Council to observe and enforce the observance of and the requirements and provisions of the District Scheme. The same subsection imposes a general statutory duty on all not to depart from the requirements and provisions of the District Scheme. Clearly, the Council having taken the view that there is no non-conforming use, is not prepared to take enforcement action; the plaintiff cannot be penalised for that decision.

Counsel then submitted that the plaintiff should have sought an advisory opinion from the Planning Tribunal under S.153 of the Act. Any decision of the Tribunal would of course be subject to appeal to this Court.

These present proceedings raise for the opinion of this Court the very matters which would be in issue before the Tribunal. I observe that in R & C Harris Ltd & Anor v Kapiti Coast District Council & Anor (unreported, C.P.985/90, Wellington, 31 May 1991), Heron J noted that the Council there preferred to seek a decision from the Court, despite S.153 proceedings having been contemplated. I see nothing disentitling the plaintiff from the relief sought because it failed to institute S.153 proceedings.

As to whether damages would be adequate remedy in the event of the plaintiff's ultimate failure, the plaintiff has filed an undertaking as to damages. I discussed in an unreported decision of BP Oil (New Zealand) Ltd v Van Beers Motors Limited & Anor (New Plymouth, M.75/90, 2 May 1991) the requirement for an undertaking as to damages which covers all reasonable losses which the person against whom a caveat is continued may suffer. Such an undertaking does not merely cover damages which that person may be entitled at law to receive. In the BP case, I held that the damages which the registered proprietor might receive from the caveator, should it ultimately be held that the caveat had been wrongly placed, were not covered by the confined statutory right to damages in the Land Transfer Act 1952. I continued the caveat on the condition that the caveator gave an undertaking as to damages.

It is unlikely that the first defendant, if ultimately

successful, could receive damages from the plaintiff under any recognised statutory or tortious duty; accordingly the undertaking as to damages covers all reasonable losses of the first defendant, should it ultimately succeed.

The first defendant does not have to give such an undertaking. Damages would be an adequate remedy for the plaintiff only if the plaintiff had a legal right to damages against the first defendant for breach of the planning scheme. Cases such as Attorney-General v Birkenhead Borough (supra) show there is no such right of action. Consequently, I conclude that damages would not be an appropriate remedy.

Having come to the view that damages would not be an appropriate remedy, the balance of convenience would normally support the issue of an interim injunction. However, the immediate grant of an injunction against the first defendant would be unnecessarily harsh. The power of the Court to issue an injunction, where as here, there is a remedy of injunction available in the District Court at the suit of the local authority, is set out by Savage J in Kapiti Borough v ANZA Trading Limited [1982] 1 NZLR 69, 70-71 thus -

> "The law as to the granting of injunctions to stop persons from committing or continuing to commit breaches of a statute for which penalties are provided in the statute is, broadly, as follows. The High Court has the reserve power to enforce a law in respect of which a particular remedy for breach of it has been given, when such remedy is

> enforceable in an inferior Court, by way of an injunction or declaration or other suitable remedy. The Court will now, however, as a rule, exercise its discretion to grant such a remedy until the remedy provided by the statute has been invoked and found ineffective unless there is some other reason for which the interests of justice require it to be granted before the statutory remedy has been tried and found wanting. Such as case is Attorney-General v Chaudry [1971] 3 All ER 938; [1971] 1 WLR 1614 where the defendants had opened an hotel in premises that did not comply with the requirements relating to safety in relation to fire. The Court of Appeal made it plain that in those circumstances where there was a grave risk of serious loss of life an injunction was properly granted to restrain the defendants from carrying on the hotel business until the fire safety requirements were met. As Bridge LJ said in Stafford Borough Council v Elkenford Ltd [1977] 2 All ER 519, 528; [1977] 1 WLR 324, 330, while it is a salutary approach to the question whether or not the Court should grant an injunction in the exercise of its discretion to show that the law enforcement authority had exhausted the possibility of restraining breaches by the exercise of the statutory remedies, it is not an inflexible rule. An injunction may even be granted when the breach of the law is plain and there appears to be an intention by the offender to continue with the breach, as was done in that case. In this case, however, the plaintiff has not invoked those principes in seeking the interim injunction - apart from anything else it is by no means clear that there is a plain brech of the law - but has relied upon the provisions of S.92(2) of the Act. Mr Broadmore submitted that the reason for that provision being enacted, and it was inserted in the Act in 1979, is so that authorities enforcing the legislation will be able to avoid the delays that follow from prosecuting offenders. That may have been part of the reason but I think it is more likely that the substantial reason was that prosecution is not always effective in achieving the aim of the legislation. The issue of an injunction can compel the offender to desist from the offending whereas prosecution may not. This remedy is in the long run no doubt the only wholly effective means of compelling compliance with the district scheme by the obstinate offender."

The first defendant has acted with propriety throughout; it took reasonable steps to ascertain whether it was acting lawfully. It bought the land only after taking

advice, both from its own planning consultant and from the Council.

With the expression of opinion I have given, I propose to adjourn the application for interim injunction for a period until 4 February 1992 to enable the first defendant to seek appropriate planning consent for its operation.

Liberty to apply at 7 days notice is reserved in case that application is (a) not processed with despatch, or (b) it is unsuccessful, or (c) more time is properly needed to exhaust the planning appeal process.

The plaintiff, having proved its point, is entitled to costs. It is unfair to award these against the first defendant. I award them against the Council in the sum of $1,000 plus GST plus disbursements as fixed by the Registrar.

I see no necessity for issuing an injunction against the Council. The proposed injunction against the first defendant achieves all that the plaintiff seeks. The Council, having indicated its view on the legality of the first defendant's use, is now placed in the difficult position of having to deal with any application by the first defendant and any objection by the plaintiff in a judicial manner.

R. D. Barker J.

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