MARRACHE v CITY COUNCIL

Supreme Court
Unsworth, C.J.
16 February 1967.

Nuisance — habitation in dangerous condition — whether nuisance order must direct execution of works — whether cost of works relevant — Public Health Ordinance, s. 84.
Nuisance — whether prohibition order may be made without a nuisance order.

The City Council obtained a nuisance order which required the appellant to execute specific works to abate dangerous structural defects in a house and prohibited its use for human habitation until the nuisance had been abated. The appellant complained that the cost of carrying out the works would be out of all proportion to the value of the property. He submitted that the proper order would merely prevent the use of the part of the building affected by the nuisance.

Held: (i) The court was obliged to order the execution of the works, even though the cost might be out of proportion to the value of the property.

(ii) An order prohibiting use for human habitation may only be made as part of a nuisance order.

Note. This case was referred to in *Carina Ltd. v Chief Public Health Inspector* (infra, p.374) but distinguished, that being an appeal against a notice, not an appeal from an order made on non-compliance with a notice.

Case referred to in the judgment.

Almeida v City Council, supra p. 118.

Appeal

This was an appeal against a nuisance order made by the magistrates' court under s. 81 of the Public Health Ordinance (Cap. 104, 1950 Ed.) [now s. 84 of Cap. 131, 1970 Ed.], which required the execution of certain works and prohibited the use of the premises for human habitation.

L.W. Triay for the appellant.
J.J. Triay for the respondent.

8 March 1967: The following judgment was read—

This is an appeal against an order of the magistrates' court directing that a nuisance on premises at No. 9 Cannon Lane should be abated by carrying out certain specified works and prohibiting the use of the premises for human habitation until the court, being satisfied that the premises have been rendered fit for that purpose, withdraws the prohibition. The nuisance alleged was that portions of the roof were defective, sagging, leaky and dangerous.

The order was made pursuant to s. 81(1) and (2) of the Public Health Ordinance (Cap. 104 of the 1950 Laws) [1] which provides as follows:—

> "(1) If the person on whom an abatement notice has been served makes default in complying with any of the requirements of the notice, or if the nuisance, although abated since the service of notice, is, in the opinion of the Council, likely to recur on the same premises, the Council shall cause a complaint to be made to a justice of the peace, and the justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.
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> (2) If on the hearing of the complaint it is proved that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, then, subject to the provisions of subsections (4) and (5) of this section the court shall make an order (hereinafter in this Ordinance referred to as "a nuisance order") for either, or both, of the following purposes—

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1 Currently s. 84 (1) of Cap. 131 (1970 Ed.).

(a) requiring the defendant to comply with all or any of the requirements of the abatement notice, or otherwise to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;

(b) prohibiting a recurrence of the nuisance, and requiring the defendant, within a time specified in the order, to execute any works necessary to prevent a recurrence;

and may also impose on the defendant a fine not exceeding £5.

Where a nuisance proved to exist is such as to render a building, in the opinion of the court, unfit for human habitation, the nuisance order may prohibit the use of the building for that purpose until a court of summary jurisdiction, being satisfied that it has been rendered fit for human habitation, withdraws the prohibition."

It was argued on behalf of the appellant that the cost of the repairs would be out of proportion to the value of the property. In these circumstances it was submitted that the court should merely prohibit the use of that part of the premises affected by the nuisance and not make an order requiring money to be spent on repairs. The respondent, on the other hand, contended that the court was bound to make an order for the carrying out of such repairs as were necessary to abate the nuisance and it was submitted that the amount of the expenditure is not a matter which the court can take into consideration. In any event the respondent did not concede that the cost of repair would be unreasonable.

Counsel for the appellant in support of his argument referred to the case of *Almeida v City Council* [1] in which Bacon C.J., upheld a decision of the magistrates making a prohibition order under s. 119 of the former Public Health Ordinance (Cap. 88, 1935 Ed.) in lieu of an order for repair under s. 118 of that Ordinance. The sections read as follows:—

"118. (1) **If a court of summary jurisdiction is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the court shall make—**

(a) an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or

(b) an order prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence; or

(c) an order both requiring abatement and prohibiting the recurrence of the nuisance.

(2) The Court may by its order impose a penalty not exceeding £5 on the person on whom the order is made, and shall also give directions as to the payment of all costs incurred up to the time of the hearing or making the order for abatement or prohibition of the nuisance.

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[1] Supra, p. 118.

> 119. Where the nuisance proved to exist is such as to render a house or building, in the judgment of a court of summary jurisdiction, unfit for human habitation, the court may prohibit the using thereof for that purpose until, in its judgment, the house or building is rendered fit for that purpose and, on the court being satisfied that it has been rendered fit for that purpose, the court may determine its previous order by another, declaring the house or building habitable, and from the date thereof such house or building may be let or inhabited."

It appears that the learned Chief Justice considered that s. 119 could be construed as a separate enactment which was not dependent upon the making of an abatement order under s. 118 and applied the test of "the cost of repair" in deciding which of the two sections to apply. He put the matter in this way:—

> "That leaves the question as to whether the order of the court below should be affirmed or varied. In other words, should an order be made under s. 118, rather than under s. 119, of the Public Health Ordinance?
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> It is true that the existing nuisance could probably be abated for the time being without condemning the North-West corner altogether. The expenditure of large sums of money could effect the repair of the great majority of insecure buildings; provided that the ratio between that expenditure and the value of the building is of no importance, it could be done as a matter of practical engineering. But it would in my view be wrong for a court to make an order, in protection of tenants, which in effect compelled the landlords to spend a wholly disproportionate sum of money on a comparatively worn-out and worthless property."

It may well have been open to the court to construe ss. 118 and 119 of the former Ordinance in the manner mentioned above. But that Ordinance has been repealed and the provisions of ss. 118 and 119 have now not only been consolidated into one section but have been worded in such a way as to make it clear that a prohibition order can only be made as supplemental to the order for abatement. The new section is s. 81 of the existing Ordinance (Cap. 104, 1950) which is set out in the early part of this judgment and I now refer to it underlining words of particular significance. It provides that the court

> "shall make an order (hereinafter in this Ordinance referred to as "a nuisance order") . . . .requiring the defendant to comply with all or any of the requirements of the abatement notice, or otherwise to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose . . . . . .
>
> Where a nuisance proved to exist is such as to render a building, in the opinion of the Court, unfit for human habitation, the nuisance order may prohibit the use of the building for that purpose until a court of summary jurisdiction, being satisfied that it has been rendered fit for human habitation, withdraws the prohibition."

It is clear, in my view, from the wording of the existing Ordinance that a prohibition can only be made as part of the nuisance order and not as a

separate order.

There remains for consideration the question whether the actual nuisance order must contain a direction to repair in a case such as that now before the court. There are, of course, nuisances (for example smoke and noise) which can be abated without any structural alteration. But the nuisance here is a dangerous roof and works are necessary for the purpose of abating that nuisance. The section is mandatory and the court is bound to make an order for the execution of those works.

For the reasons given in this judgment I have reached the conlusion that the court is required under the law to direct the execution of the necessary works and cannot refuse to do so on the ground that the expense would be out of proportion to the value of the premises. In these circumstances it is unnecessary for me to consider the issue of expense raised in the grounds of appeal and indeed it would appear that I have no jurisdiction to do so.

I have reached this conclusion with reluctance because (quite apart from the merits or otherwise of the present case) cases could arise in which the cost of repair was out of all proportion to the value or life of the property. In England such cases would probably be dealt with under the Housing Act which includes provision for the making of closing orders in appropriate cases.

The case is dismissed.