# CARINA LTD. v CHIEF PUBLIC HEALTH INSPECTOR

Supreme Court
Spry, C.J.
15 August 1977.

*Nuisance — notice to abate — powers of magistrate on appeal — Public Health Ordinance,* s. 339(5)(c).
*Nuisance — whether abatement notice reasonable — relevance of cost.*
*Nuisance — whether abatement notice reasonable — relevance of alternative powers — Public Health Ordinance,* ss. 83 and 39.

2 The Chief Public Health Inspector served notice under s. 83 of the Public Health Ordinance (Cap. 131, 1970 Ed.) requiring the owner (the appellant company) to abate certain nuisances. The owner appealed to the magistrates' court contending that, having regard to the cost of abatement, action ought to have been taken under s. 39, which gives the owner the option of demolishing. The stipendiary magistrate dismissed the appeal, holding that s. 39 applied only to buildings in a more ruinous and dangerous state and that the inspector had not exercised his discretion improperly in choosing the section under which to act.

**Held:** (i) Where a notice served on an owner relates to structural and other defects, the magistrate on appeal is entitled to look at the notice as a whole.

(ii) While s. 39 of the Public Health Ordinance is appropriate to cases of imminent danger, its application is not limited to such cases.

(iii) The real issue was not which section was more appropriate but whether the notice served was reasonable.

(iv) The probable cost of abatement is highly relevant in considering reasonableness and may be considered in relation to income as well as capital value.

(v) The effect of the order on tenants in the building was irrelevant.

(vi) The power of the magistrate was limited to allowing the appeal, in whole or in part, or dismissing it.

**Cases referred to in the judgment.**

*Johnson v Leicester Corporation*, [1934] All E.R. (Reprint) 493.
*Bacon v Grimsby Corporation*, [1949] 2 All E.R. 875.
*Almeida v City Council*, supra p. 118.
*Marrache v City Council*, supra p. 215.
*Salford City Council v McNally*, [1975] 2 All E.R. 860.
*Buswell v Goodwin*, [1971] 1 All E.R. 418.

**Appeal**

This was an appeal against an order of the magistrates' court, upholding a notice of abatement served by the Chief Public Health Inspector under s. 83 of the Public Health Ordinance.

J.E. Triay for the appellant.
E. Thistlethwaite for the respondent.

**25 August 1977: The following judgment was read—**

This is an appeal from an order of the learned stipendiary magistrate in an appeal against a notice served on the appellant company by the respondent, to whom I shall refer as the chief inspector, under s. 83 of the Public Health Ordinance, requiring the company to abate certain nuisances.

It is agreed that some of these nuisances arise from defects of a structural character and therefore that an appeal lay under s. 339 by virtue of s. 83(2). An appeal to this court lies under s. 349.

One ground of appeal relates to the scope of the appeal to the magistrate. Where a notice relates to defects of a structural character, it must be served on the owner of the premises and it is only in respect of such a notice that an appeal lies. From this, the magistrate concluded that where a notice served on an owner relates both to structural defects and other nuisances, he has jurisdiction only to deal with those parts of the notice that relate to the structural defects. Mr. J.E. Triay, who appeared for the company, submitted that in such cases the right of appeal is against the notice, that is, the notice as a whole. I think there is merit in that submission. One of the most important grounds of appeal available is that the requirements of a notice are unreasonable and I think that must entail looking at the notice in its entirety. This does not, of course, mean that in an appropriate case an appellant might not claim, or the magistrate hold, that part only of the requirements were unreasonable.

The appeal relates to a building known as 49 Cumberland Road to which I shall refer as No. 49. The building comprises two shops, a small store and four apartments. On the east of the building there is a small patio bounded by a retaining wall. The ground level behind this wall is considerably higher than the level of the patio and rises steeply. The retaining wall was built in or about 1830. The building was erected in 1909. At some later date a bathroom was added at first floor level over the patio and joining the building to the retaining wall.

In 1970, an abatement notice was served on the then owner of No. 49 in relation to the retaining wall. The ownership of the wall was disputed but a compromise was reached whereby certain works were carried out, the cost being borne in equal shares by the Government and the owner of No. 49. These works included shoring the wall. It is unfortunate that this question of ownership has never been resolved.

In March 1976, the chief inspector wrote, pointing out various defects in the building and advising that repairs be carried out "before the state of this property deteriorate any further and becomes a danger to persons living within". Correspondence ensued with which it is unnecessary to deal in detail. By July, the chief inspector was referring to the building as dangerous, the retaining wall was assuming increased importance and an issue had been raised whether it was the duty of the company or of the Government as public health authority to evacuate the premises. The company's solicitors had referred to s. 39 of the Ordinance and given advance notice of an intention to elect to demolish the building. These exchanges culminated in the issue on 29 October 1976 of the notice appealed against, requiring the company to abate some 25 nuisances within 90 days.

The company appealed to the magistrates' court by way of complaint in accordance with s. 348, the grounds of appeal amounting substantially to a contention that action should have been taken under s. 39 of the Ordinance, not under s. 83.

I need not set out these sections in full. It is, I think, sufficient to say that s. 39 empowers the Government to apply to the magistrates' court for an order for the repair of a dangerous building or, if the owner so elects, for its demolition. Section 83 empowers the Government to serve an abatement notice in the case of a dangerous building. The owner has no election to demolish but, if the defect is of a structural nature, he may appeal, inter alia, on the ground that the requirement is unreasonable.

At the hearing of the appeal before the magistrate, six witnesses were called, three for each party. The company called the rent collector to prove the rents received in respect of No. 49, and two civil engineers, a Mr. Massias and a Mr. Beriro. The chief inspector himself gave evidence and called a Mr. Santos, a chartered engineer. He also called a surveyor in the employment of the Government to give evidence as to the ownership of the retaining wall. This witness was not cross-examined and the magistrate did not rely on his evidence, holding that the proceedings were not the appropriate forum for determining questions of title.

The two engineers who gave evidence for the company regarded the situation generally as dangerous, with the danger coming mainly from the retaining wall. If that were to fail, the bathroom would collapse. So far as the main building of No. 49 is concerned, they thought major structural repair was necessary but they could not be sure of the extent of it without opening up plaster and tiling. They both thought that the minimum cost of reparation would be £12,000, and that it might be very substantially higher.

The chief inspector's opinion was that the building was not structurally dangerous in the sense that there was no imminent danger of collapse. He thought it was dangerous, in the sense that falling plaster could constitute a danger. For that reason, he had decided to act under s. 83 of the Public Health Ordinance, not s. 39, as the appellant had requested. He thought the estimate of the cost of the necessary repairs was exaggerated in some respects but did not quarrel with the figure of £12,000. He appears to have regarded the matter of cost as irrelevant in deciding which section to invoke.

Mr. Santos also thought that the building was in no danger of collapse but he thought the retaining wall and the bathroom ought to be demolished and rebuilt. At the same time, he thought the retaining wall was temporarily safe because of the shoring.

It was argued for the company that the notice was unreasonable, having regard to the estimated cost of the work necessary to abate the nuisance in relation to the revenue the building yields, which at least as regards the residential apartments, is controlled by the Landlord and Tenant (Miscellaneous Provisions) Ordinance. It was the case for the company that a notice under s. 39 would have been more reasonable, since under that section, the owner has the option of demolishing the building.

The magistrate rejected this contention. He expressed the opinion that "section 39 is intended for houses which have reached a step further than this particular building in its dilapidation, ruinous or dangerous state." He concluded that "I cannot say that the Chief Public Health Inspector in the exercise of his discretion has chosen the wrong section." He allowed further time for the execution of work in respect of the retaining wall but otherwise dismissed the appeal.

The magistrate did not entirely ignore the question of reasonableness. He began by referring to s. 80(2), although that subsection has, strictly, no relevance, since it relates to acts done, not future requirements. Also, in dealing with the submissions of counsel, he said—

> "Moreover where a particular provision of the law specifically mentions the question of reasonableness then the courts are directed to take all relevant factors into account in reaching a decision, including the question of expense wherever relevant".

He went on, however, to say that the courts have to administer the law as they find it, not as they would like it to be, and he appears to have thought that if s. 83 were the more appropriate section, that really disposed of the matter. In fact, he appears to have regarded the issue as whether the

exercise of his discretion by the chief inspector in choosing to act under s. 83 rather than s. 39 was reasonable, whereas the true issue was whether the notice itself was reasonable.

This approach was developed by Mr. Thistlethwaite, for the chief inspector, in this court. He argued that s. 39 applies only to cases where the danger of collapse is imminent and s. 82(1) to cases where there is no imminent danger. He based his argument on the paradox that the procedure contained in ss. 83 to 86 for nuisances that may be dealt with summarily is in fact more protracted than that under s. 39. He submitted that the chief inspector had to act under s. 83 because there was no alternative available to him.

With respect, I am not persuaded. There is nothing in the wording of the statute to indicate that s. 39 is reserved for cases of imminent danger. There must be a very strong, if not imperative, reason to justify reading into a statute words that are not there. It is clear from the opening words of s. 82 that the two provisions are not mutually exclusive. I accept that s. 39 is the section that an inspector would naturally and properly use in a case of imminent danger but that does not mean that there are not other classes of case for which it may also be appropriate. I can find nothing in the Ordinance to prevent s. 39 being used in a case where there is no imminent danger but where there is an element of danger and the cost of reparation would be out of all proportion to the value of the building.

I think that s. 39 has been given an undue importance in this case. This was largely the fault of the company, because a prayer for an order under s. 39 was included in both its appeals. I think such prayers were misconceived. The only relevance of s. 39, in my opinion, is that the availability or non-availability of an alternative procedure is a factor to be taken into account in deciding whether the notice served under s. 83 was, in all the circumstances, reasonable. I think there was an alternative course open to the chief inspector.

The real issue in this appeal is whether the notice that was served is reasonable. The case for the company is simple. Mr. Triay submits that there is uncontradicted evidence that compliance with the notice would entail the expenditure of at least £12,000 and possibly considerably more. If the company pays that out of its own resources, it will lose the interest or profit that the money would have earned, which, at a rate of 10 per centum, which is probably reasonable, would amount to at least £1,200 per annum. If the company borrowed the money, it would have to pay even more in interest. The rental income from the building is just under £1,200 per annum. So far as the residential apartments are concerned, no part of the expenditure could be passed on in the form of increased rent. The position regarding the shops is not clear. Thus what is now a substantial, if diminishing, asset would become worthless, since it would yield no nett income. If the expenditure should exceed £12,000, the building would become an immediate liability and in any case, since further repairs are bound to become necessary, it is at best a potential liability.

As regards the test of reasonableness, Mr. Thistlethwaite placed much reliance on the English cases of *Johnson v Leicester Corporation*[1] and *Bacon v Grimsby Corporation*[2]. These were cases arising out of the Housing Acts of 1930 and 1936 respectively. The first is authority for saying that for the purposes of these Acts, the reasonableness of expense has to be considered objectively. With respect, I do not think that case is of any assistance here. Under the Housing Acts, the authority decides, before issuing a notice, whether a house can at a reasonable expense be made habitable. Hence, in *Johnson's* case, Slesser, L.J., said—

> "They have to consider.....the reasonable expense, not at that stage, at any rate, what the owner thinks to be reasonable, because he has not yet been called into the consultation. They have to make that decision one might say exparte and unaided by the views of the owner."

The position is entirely different under the Gibraltar Public Health Ordinance. The concept of reasonableness comes in at a much later stage, that is, at the time of appeal, and it is brought in by the appellant, if he invokes s. 339 (3)(c) which allows an appeal where "the requirements of the notice are.....unreasonable in character or extent." In those circumstances, there can be no question of an objective test: the appellant is saying that the notice is unreasonable so far as it affects him, and his main concern will normally be the cost of the work required.

*Bacon's* case has given me rather more difficulty because, although it is distinguishable in the same way as *Johnson's* case, it is a case where the point was raised that the owner would not receive any higher rents after the repairs than before and the cost of the repairs was high in relation to the rents. The court based its decision largely on the fact that if the repairs were not carried out "the house might be demolished and disappear altogether as a rent producing asset." But to understand *Bacon's* case, it must be remembered that interest rates in 1949 were very different from what they are today, and I think that if the figures are examined with that in mind, it is clear that after paying the cost of the repairs, the owner would still have had some nett income. Here, the repairs would make the building cease to be a rent producing asset on a nett basis.

Mr. Thistlethwaite relied on *Bacon's* case largely for the proposition that "The estimated cost of the works and the estimated value of the house when they are completed form the criterion which has to be applied...." and he submitted that if reasonableness was the test, there was not sufficient material before the court, since neither the present freehold value of the house nor its likely value after repair are known, as the estimate of cost is in the realm of guesswork. Mr. Triay commented that the repairs would not increase the value of the building if the rents remained the same: this is not literally true but certainly the increase in value would be relatively small.

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[1] [1934] All E.R. 493. [2] [1949] 2 All E.R. 875.

Reference was also made to two decisions of this Court, *Almeida v City Council*[1] and *Marrache v City Council*[2]. In the earlier of these cases, Bacon, C.J., dealing with ss. 118 and 119 of the former Public Health Ordinance (Cap. 88, 1935 Ed.), remarked that it would be wrong for a court to make an order compelling landlords to spend a wholly disproportionate sum of money on a comparatively worn-out and worthless property. In the latter, Unsworth, C.J., remarked that he could not follow that decision, since the Ordinance had been repealed and replaced, and the new s. 81 [now numbered 84], which replaced the old ss. 118 and 119, was mandatory in its terms. With respect, I think neither case is of any real relevance, because they deal not with appeals against notices but with appeals against orders made because of non-compliance with notices. The considerations in such appeals are different, and the cases have only slight persuasive value for the reasoning they disclose.

Also, I do not think any of the English cases ought to be relied on, because our statute law although based on that of England, is in fact so different.

I think also that it is undesirable to attempt to lay down any general rules: each case must be looked at on its own merits in all the circumstances. There will be cases where capital values provide the best test, but I see no reason why the income element should not also be given due weight. In this respect, the current level of interest rates will always be a factor to be considered. In my opinion, with interest rates at their present level, it is quite unreasonable to require the company to spend £12,000 or more on a sixty-eight year old building which yields only £1,200 per annum in rents.

That is sufficient to dispose of the appeal, but there are one or two other matters on which I must briefly comment. There have been references to the tenants in the building and the way they may be affected by any order that may be made. In my opinion, that is a factor which cannot properly be taken into account in these proceedings.

In this, I adopt, with respect, the reasoning of Lord Edmund-Davies in *Salford City Council v McNally*[3] and that of Widgery, L.J., in *Buswell v Goodwin*[4]. The tenants enjoy the protection afforded by the Landlord and Tenant (Miscellaneous Provisions) Ordinance: their rights are statutory rights and the court has no jurisdiction either to enlarge or to diminish them. They are irrelevant to the questions in issue here. I may add that I do not think the magistrate misdirected himself in this respect: I think his references to the tenants and their re-housing were mere asides.

There was undoubtedly a conflict of evidence between the witnesses, as to the nature and gravity of the danger to which the occupants of the building and other persons are exposed. On this, the magistrate made no express finding, although it might be inferred that he preferred the evidence

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1 Supra, p. 118.
2 Supra, p. 215.
3 [1975] 2 All E.R. 860.
4 [1971] 1 All E.R. 418.

of the chief inspector and Mr. Santos. However, nothing turns on this, as the evidence is that the building and the retaining wall are dangerous and the degree of danger is immaterial to these proceedings.

Mr. Triay also argued that whether the retaining wall is owned by the company or by the Government, as the adjoining owner, is immaterial, as in either case the Government would be responsible for its maintenance, either as owner of the wall or as owner of the dominant tenement enjoying an easement of support. I do not think this argument is available, because there was no compliance with the requirements of s. 339(5)(a) and (b).

Finally, the magistrate purported to make his order under s. 339(5)(c), which he thought empowered him to make such order as he thought fit. I think, with respect, that that paragraph applies only in the case of appeals to which paragraphs (e) and (f) of subs. (3) apply. If I am correct, there appears to be no provision setting out the powers of the magistrate in an appeal such as this. Appellate powers are entirely statutory, and in the absence of any express provision, the powers of the magistrate are limited to those which every appellate court must necessarily enjoy; that is to say, he could allow the appeal in whole or in part or he could dismiss it. He could not, and this court cannot, make the other orders for which the company prayed.

Accordingly, the order of the magistrate is set aside, and the notice served on the company under s. 83 is quashed. It is not for this court to direct the chief inspector what his next step should be; that is for him to decide.