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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

CAUSE # 146 of 1990
CONSOLIDATED WITH
CAUSE # 147 of 1990

BETWEEN:	<u>CAYMAN PROPERTY CORPORATION LTD.</u> AND CAYMAN ARMS (1982) LTD.	PLAINTIFFS
AND:	CENTRAL PLANNING AUTHORITY	DEFENDANT

Mr. Pierre Lamontagne Q.C. with Mr. Charles Adams
for plaintiffs.

Mr. Michael Marsden for the defendant.

JUDGMENT

SCHOFIELD J.

The Cayside Building is owned by the Cayman Property Corporation Ltd., which is the plaintiff in cause 146 of 1990 and to which I shall refer as "CPC". The property is registered in the Land Registry as George Town Central Block OPY, Parcel 114. The area in which the property is situated is zoned as commercial for planning purposes. Cayman Arms (1982) Ltd., the plaintiff in cause 147 of 1990, operated a bar and restaurant called "the Cayman Arms," on the first floor (or second floor if one applies American terminology) of the property adjoining the Cayside Building. That property is registered as George Town Central, Block OPY, Parcel 113, and is leased by the Cayman Arms.

CPC decided to remodel and extend the office and shop accommodation in the Cayside Building and obtained planning permission therefor. However, during the course of construction CPC decided to

add an extension to the Cayside Building to which the planning permission did not extend. That extension immediately adjoins the leased Cayman Arms premises. On the 22nd January 1986 CPC's architects applied to the Central Planning Authority (hereinafter called "the Authority") for permission to retain that extension. In the letter accompanying the form of application the architects stated that the intention was to provide space for a new kitchen for the Cayman Arms whose present kitchen was wholly inadequate.

There was substantial delay in the Authority's consideration of this application which seems, in part at least, to be due to a letter from the Authority, dated 15th December 1986, requesting a floor plan and kitchen layout for the Cayman Arms and connecting areas of the Cayside Building, not being received by CPC. During this period, in fact on the 21st September 1987, the Cayman Arms closed for the purpose of surveying the condition of the premises and of effecting repairs and refurbishments. The Authority not having received the information it requested resolved, on 30th September, 1988, to issue an enforcement notice pursuant to section 15 of the Development and Planning Law, requiring CPC to demolish the extension.

CPC applied to this Court for an order to quash the enforcement notice and leave was granted on 3rd January, 1989, for permission to move for such an order. A stay of the enforcement notice was also granted. Negotiations were opened between CPC and the Authority which resulted in a letter from the attorneys for CPC, countersigned by the Principal State Counsel acting for the Authority, setting out the agreement reached. I need not recite the contents of the letter in full. Basically the agreement was that the Authority could see no compelling reason to refuse approval for CPC to retain the extension subject to the wall adjoining the Cayman Arms being closed up and the extension being totally independent of it. The enforcement notice would thereupon be withdrawn and the application for judicial review would also be withdrawn. This understanding was stated to reflect the surrounding circumstances which were, inter alia, that the Cayman Arms was involved in a legal dispute with its landlords over whether they were lessees of the premises on plot 113, and that future use of the extension to the Cayside Building would

depend upon the outcome of legal proceedings in that regard. It was stated that for the moment CPC would not use the internal space of the extension and in exchange for a report from an independent engineer that the extension was necessary for the structural integrity of the building the Authority would issue a certificate of occupancy for the first floor of the Cayside Building to the extent that such certificate was necessary. The following paragraph must be quoted because it is the foundation of the contention in relation to this aspect of the suit:

"When CPC is in a position to determine the use of the extension, such use will comply with the law and regulations and any prior approvals (obviously including any necessary prior approval from (the Authority)) would then be sought."

That letter was dated the 26th July, 1989, and was countersigned on the following day. It is significant that in original draft of the letter the portion in brackets referring to approval of the Authority was missing and it was included in the final draft after an exchange of letters. In the event the Cayman Arms was held to be the lessee of the adjoining premises and CPC intended to lease the extension to the Cayside Building as the Cayman Arms' kitchen.

By Regulation 29 of the Development and Planning Regulations, 1977, certificates of fitness for occupancy shall be obtained from the Authority before any new buildings are occupied. On 27th September, 1989, the Authority issued such a certificate to CPC in respect of the development to the Cayside Building but excluding the extension. On 24th October, 1989, the Authority issued a further certificate "for commercial use for the Cayside extension". This certificate was conditioned on the applicants' compliance with its undertakings to the Attorney General's Department and the Director of Planning.

The Authority, on the 1st November 1989, granted planning permission to CPC to retain the extension but attached the following conditions to that permission:

- (a) adherence to any conditions imposed by the Chief Building Control Officer relating to construction details;
- (b) the extension to be vacant floor space and not used until the Authority, upon application, considered and approved use.

CPC applies in cause 146 of 1990 for a declaration that the conditions attached to the planning permission granted 1st November, 1989, are invalid and/or avoid and/or of no effect. In respect of condition (a) it is urged that such condition is useless and unrelated to my planning permission since the extension was already fully constructed when approval was given. Condition (b) is attacked on various heads to which I shall return. The enforcement notice has never been withdrawn, it seems because CPC has never applied for permission relating to use of the extension, and a further declaration is sought that such notice is void and/or invalid and/or of no effect. Further declarations are sought that the extension may be used for any commercial purposes, including use as a restaurant kitchen, without any further approval from the Authority.

But that is not the end of the story for the Cayman Arms entered the arena by submitting to the Authority two applications for planning permission.

The first application, dated 6th November, 1989, was for the opening of the communicating door between the Cayman Arms premises and the extension to the Cayside Building. There was some communication between the Cayman Arms and the Chief Environment Health Officer over the drainage of sewage from the proposed kitchen in the extension. That officer was concerned lest sewage was to be disposed of through the system in the building in which the Cayman Arms is situated, which he considered unsuitable or inadequate. The Authority, by a decision of 14th February 1990, deferred the application for:

"The identification of an adequate method of sewage disposal which is approved by the Chief Environmental Health Officer and the lack of a proper sewage disposal system endanges (sic) the health and safety of residents and neighbours.

The Authority determined identification of adequate disposal is necessary."

It seems that the problem of sewage disposal has been resolved to the satisfaction of the Chief Environmental Health Officer, for a proposal submitted by Cayman Arms was accepted by him by letter dated 30th April, 1990, subject to certain normal conditions. However, the landlord of the Cayman Arms premises needs to cooperate to put these proposals into effect and the Cayman Arms is taking legal action to secure compliance under the lease in connection therewith. Be that as it may, in connection with that application for planning permission the Cayman Arms seeks declarations that the decision by the Authority to defer planning permission on the grounds stated is void and/or invalid and that the Authority must consider the application without having regard to any question of sewage disposal.

The second application for planning permission was dated the 30th March, 1990, and sought permission to erect an emergency door and stairway leading from the Cayman Arms to the outside ground. No reference to that application was made in the originating summons as originally filed but just before the hearing, on 9th July, 1990, the Cayman Arms received notification that such planning permission had been granted subject, inter alia, to the condition that:

"(c) The Cayman Arms cannot be occupied until the Chief Building Control Officer, Chief Environmental Health Officer and Chief Fire Officer approves the occupation."

At the hearing leave was granted to amend the originating summons in cause 147 of 1990 to include a prayer for a declaration that this condition is invalid and/or void and of no effect.

To my mind the pivotal point in relation to the declarations sought by CPC regarding the extension to the Cayside Building, and indeed (for reasons which will become apparent) in relation to the declarations sought by the Cayman Arms regarding the communicating door, is whether the Authority was right to impose a condition to its planning approval of 1st November, 1989,

that the extension is not to be used without further application being made to the Authority. It is argued for CPC that the Development and Planning Law does not empower the Authority to prohibit, as opposed to specify, the use of a building. It is further argued that the only power which exists in the Authority to specify the use to which a building may be put exists at the time when such permission is first granted. That as planning permission has been granted the Authority cannot now specify the use to which the extension is put, provided of course that the use to which it is put is a commercial use, the building being in a commercial zone.

The Authority is the body charged with the duty of considering applications for planning permission.

Subsection (1) of section 10 of the Development and Planning Law reads:

"10.(1) Subject to the provisions of this Law, permission shall be required under this Part for any development of land that is carried out after the appointed day. Except where otherwise provided for by this Law, permission shall not be given which would result in a development at variance with a development plan and, in particular in the case of development in the Lesser Islands, at variance with the guidelines therefor contained in any such plan."

The relevant portion of subsection (2) of that section reads

"10.(2) In this Law, except where the context otherwise requires, the expression "development" means the carrying out of building, engineering 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 subdivision of any land,..."

There follow exceptions which do not apply to this case. It is clear, therefore, that the Law is concerned with any material change of use of a building and the Authority exerts control over such change of use. By section 2 of the Law "building" includes any part of a building.

Section 12(1) of the Law permits the Authority to impose "such conditions as it thinks fit" to a grant of permission to develop and section 13(1) of the Law reads:

"13.(1) The power to grant permission to develop land under this Part shall include power to grant permission for the retention on land of any building or works constructed or carried out thereon before the date of the application, or for the continuance of any use of land instituted before that date (without permission granted under this Part or in accordance with permission granted for a limited period only); and references in this Part to permission to develop land or carry out any development of land, and to application for such permission, shall be construed accordingly."

Subsection (3) of the section reads:

"13.(3) Where permission is granted under this Part for erection of a building, the grant of permission may specify the purpose for which the building may be used; and if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed."

The application to retain the extension to the Cayside Building is thus made under section 13(1) of the Law, but that section must be read together with the other relevant provisions and not in isolation.

From these statutory provisions it is clear that the Authority had the power to specify the use to which the extension was to be put on this application for permission to retain the extension. I can see no force in the argument that because the Authority did not specify such use in its grant of permission to retain the structure, because the applicants for permission were unable to specify the use to which the extension was intended to be put, the Authority cannot still retain to itself the power to specify such use once an intended use was declared by the applicants. Surely when faced with uncertainty on the part of the applicants over the use to which the extension would be put the Authority was entitled to effectively defer that part of their decision relating to use. It is, to my mind, a fair and

reasonable use of the Authority's power under section 12(1) of the Law to impose conditions to require a further application to be made by the applicants once the applicants are in a position, as they now are, to state what use they intend to put the extension to. There is nothing in the wording or the spirit of these statutory provisions which prevented the Authority from imposing the condition as to the necessity for further application being made before the use of the extension is permitted. It is argued that power to regulate does not include power to prohibit, but I do not think the Authority was attaching a condition to planning permission which prohibited the extension's use. The Authority was merely deferring a decision as to use until it was seized of all information necessary to make a final determination.

It is argued that there has been no change of use of the extension so as to warrant the necessity for any permission being applied for: that where the statute, in section 10(2), refers to "change of use" this predicates a use before and a use after, whereas this extension has never been used. I view that as too subtle an interpretation of the statute and I am fortified in my view by the following words from Petticoat Lane Rentals Ltd. v. Secretary of State for the Environment [1971] 2 All ER 793. In that case planning permission was given for the erection of a building on a clear site and the building was put up. Widgery LJ. (as he then was) said this at p. 796:

"Where that happens.....one gets in my judgment an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. The new planning unit, the new building, starts with a nil use, that is to say immediately after it was completed it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, that use is a use which can be restrained by planning control."

Counsel for the plaintiffs submits that whilst the agreement between the Authority and CPC which resulted in the withdrawal of the earlier court action did not give CPC any right

capable of being enforced as a matter of private law, it gave rise to a legitimate or reasonable expectation on the part of CPC, and even Cayman Arms, as a matter of public law that the Authority would withdraw the enforcement notice and grant permission to retain the extension. However, if one looks at the letter of agreement it is clear that CPC agreed not to use the extension for the time being and to obtain any necessary prior approvals once it was in a position to determine the use of the extension. There had been correspondence which resulted in specific reference to "necessary prior approval" by the Authority being included in the relevant paragraph of the agreement. CPC now says no approval of the Authority is necessary. It must have been clear to CPC, from the history of the application and from the correspondence, that the Authority still considered it had a right to a say in the use of the extension. From that agreement arises no legitimate or reasonable expectation that the Authority would give permission to retain the extension without reference to its use. I would go so far as to say that CPC could only reasonably expect from the terms of that agreement controversy in this connection if it maintained its position that the Authority had no control over the use of the extension. The agreement between CPC and the Authority laid the foundation for further controversy and provided CPC with no legitimate or reasonable expectation that the controversy would be ended by the grant of unconditional permission to retain the extension.

The issue of the certificates of occupancy by the Authority does not affect the question of legitimate or reasonable expectation on the part of CPC. The first such certificate specifically excepted the extension. The second such certificate which related to the extension was conditioned "on the applicant's compliance with its undertakings to the Attorney General's Department and to the Director of Planning as set out in the letters of undertaking dated 11th May, 1989, and 4th July, 1989." Of course, it does seem anomalous for the Authority to grant a certificate of occupancy in respect of a building for which it had not yet given planning permission and which it

maintains should not be used without further application being made in regard to its use, but the certificate was so clearly anomalous, and its terms so equivocal, that it cannot have raised a legitimate or reasonable expectation in CPC that unconditional permission to use the extension had been granted by the Authority.

Assuming for the moment that the enforcement notice regarding the extension was validly issued, I consider the above reasoning also applies to the plaintiffs' submissions regarding legitimate or reasonable expectation of withdrawal of the enforcement notice. The following are the first two paragraphs of the agreement:

"In principle, there is no compelling reason why your client (the Authority) cannot grant its approval to allow CPC to retain the extension as it is, subject to the north wall adjoining the (Cayman Arms premises) being closed up in order to ensure that the extension becomes totally independent from the (Cayman Arms premises) and that there is no means of access to or egress from that property, and further, subject to there being a partition at the south end of the extension.

That approval as above would entail the withdrawal of the Enforcement Notice."

Withdrawal of the enforcement notice was thus linked to the Authority's grant of approval to retain the extension, which in turn was subject to the Cayside Building extension and the Cayman Arms premises being unconnected. Approval to obtain the extension, with the condition of non-user, was communicated on 20th November, 1989. Some two months prior to that Cayman Arms had determined, with the approval of CPC, to use the extension as a kitchen. The application to open the connecting door had been filed in early November, 1989, yet CPC had not by then made the application which the Authority no doubt anticipated for permission to use the extension as a kitchen for Cayman Arms. Given those circumstances I do not think the plaintiffs could legitimately or reasonably expect the Authority to take yet further action upon the agreement by withdrawing the enforcement

notice. The Authority could reasonably be expected to wait for further application from CPC.

Was the enforcement notice valid? According to section 15(1) of the Law an enforcement notice may be issued "having regard to the provisions of the development plan and to any other material considerations". The resolution of the Authority to issue the notice, dated the 30th September, 1988, gives the following as the material considerations:

- "a) that the development is a fire hazard;
- b) that there have been complaints from the adjacent property owner."

It is conceded by the Authority that (b) is not a relevant consideration. The Authority had a duty to consider the complaints and see whether it could adopt those complaints for itself as material considerations; the fact of the complaints should not have been a basis of the Authority's decision. Consideration (a) is unhappily worded because at the time the notice was issued the extension was not in use and did not constitute a fire hazard. However it had been intimated from the initial application that the extension was intended to be used as a kitchen; that is what the Authority would consider the application was all about. As has been seen use of the building is a relevant consideration for the Authority and use as a kitchen is a potential fire hazard. In those circumstances the fire hazard consideration, even though potential, was a proper consideration for the Authority. That being so the enforcement notice was validly issued.

So far as the application for planning permission to open the door communicating the Cayman Arms to the Cayside Building extension is concerned, Cayman Arms argue that the reason given to defer planning permission, that of identification of an adequate method of sewage disposal, had no relevance to the application before the Authority. It is argued that opening doorways does not produce any sewage. But it is impossible to isolate that application from the application of CPC to retain the extension and from the intention of Cayman Arms to use the

extension as a kitchen. If the Cayman Arms does not intend to use the extension there would be no need for the application in the first place. To my mind the Authority is not acting unreasonably or improperly in considering that application for planning permission as part and parcel of the Cayside Building extension application. The two cannot be severed and should be considered together. It is not unreasonable or improper for the Authority to defer the application for the opening of the connecting door until the planning status of the extension to the Cayside Building is finally determined. In this I do not intend to derogate from the force of the English Court of Appeal decision in Pyx Granite Co., Ltd. v Ministry of Housing and Local Government and Another [1958] 1 All ER 625, and, indeed, other English authorities, that conditions attached to planning permission must fairly and reasonably relate to the permitted development. The view I take in this case is that the application to open the connecting door must be related to the use of the extension and that together they relate to the same development. Furthermore, I cannot accept the plaintiffs' contention that sewage disposal is not a planning consideration. The Second Schedule of the Law provides that it is a matter for which provision may be made in the Development Plan. The Development Plan 1977 refers to it as a planning consideration and whilst the plan does not enter into detailed consideration on the question of sewage disposal facilities it would, in my view, be improper for the Authority to fail to consider questions of sewage disposal.

It follows from all this that I am not prepared to grant the declaration sought in respect of the enforcement notice, or any declaration that the Authority was wrong in attaching a condition relating to the use of the extension. Nor am I prepared to grant any declaration to the effect that the extension may be used for any purpose without prior approval of the Authority or any declaration that the deferral of the application to open the communicating door was improper.

There still falls for determination the question of the

validity or otherwise of condition (a) attached to the planning permission of 1st November, 1989, that conditions imposed by the Chief Building Control Officer be adhered to relating to construction of the extension, and the question of the validity or otherwise of the conditions attached to the grant of planning permission in respect of the fire escape from the Cayman Arms premises.

I agree with the plaintiffs that the imposition of the condition (a) in the grant of planning permission for the extension was unnecessary, indeed, in counsel's word, useless. It is undoubtedly a standard clause which bears no relevance to this case because the extension was already built when the grant was made. The Authority concedes this; it is a redundant clause. The question then falls to be considered: do I need to grant a declaration to the effect that the condition is of no effect? In the circumstances, the Authority accepting that the condition is of no effect, and, having regard to my decision that condition (b) will stand, I do not consider that I need make the declaration sought.

Turning now to the grant of planning permission for the fire escape from the Cayman Arms premises, it is argued that the condition that the Cayman Arms cannot be occupied until the Chief Building Control Officer, the Chief Environmental Health Officer and the Chief Fire Officer approve the occupation is invalid and/or void and of no effect. It is argued that the matter of occupancy is, by Regulation 29 of the Development and Planning Regulations, 1977, a matter for the Authority and yet this condition seeks to delegate that matter to three outside officials. The Authority now recognizes that the question of planning permission for a fire escape is not a matter which should concern the Chief Environmental Health Officer. However, the Authority maintains that it is proper to attach a condition, on this application, that the building may not be used until approval is obtained from the Chief Building Control Officer and the Chief Fire Officer.

Planning permission has been granted for the erection of this fire escape. Its erection only has relevance for the Cayman Arms if the property can be used. The Development and Planning Regulations, in regulation 29, provide that the building may only be used after a certificate of fitness for occupancy has been obtained from the Authority. It is the Authority, therefore, which determines whether the building may be used after planning permission has been granted. It is relevant and proper for the Authority to ascertain whether the fire escape is being and has been properly erected according to necessary specifications. In this connection it is relevant and proper to seek the advice and assistance of the Chief Building Control Officer and the Chief Fire Officer. But to delegate to these officers the planning decision of whether the building is suitable for occupation after the development has been completed goes too far and amounts to an unreasonable and improper delegation of the Authority's duty. To hand over to outside officials, who may not be constrained by planning considerations, the decision on whether the applicant gains the benefit of the grant of planning permission by being allowed to use his premises after the development has been completed is unreasonable and improper. It cannot be too difficult to draft a condition which requires the input of those two officials without giving them the power to nullify the effect of planning permission. In the event, therefore, I find that condition (c) of the planning approval of 4th July, 1990, is unlawful and void and I so declare.

The upshot is that I refuse the prayers for the declarations sought in cause 146 of 1990 relating to the Cayside Building extension. I refuse the prayers for the declarations sought in paragraphs (1) and (2) of the summons in cause 147 of 1990, relating to the opening of the communicating door between the Cayman Arms premises and the Cayside Building. I grant the declaration that condition (c) of the planning permission dated 9th July, 1990, for the erection of an emergency door and staircase in the Cayman Arms premises is invalid and void.

I now invite submissions on the question of costs.

D. Sch...

A handwritten signature in black ink, appearing to be 'D. Sch...', written over the typed name.

Dated this 23rd day of August, 1990