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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY

BETWEEN PROPRIETORS STRATA PLAN NO. 79 PLAINTIFF

AND DENNIS SINGH DEFENDANT

Mr. Garth McBean instructed by Dunn, Cox, Orrett & Ashenheim for Plaintiff
Miss Dawn Satterswaite and Miss K Phipps for Defendant.

Heard May 28, July 31, 1997

JUDGMENT IN CHAMBERS

KARL HARRISON J

Nature of Case

The plaintiff is the proprietor of Strata Plan No. 79 situate at "Ocean House", 8 Ocean Boulevard in the Parish of Kingston. The defendant and his wife on the other hand are joint owners of Strata Lot No. 41 which forms part of Strata Plan No. 79. This application is by way of an Originating Summons and it is seeking the undermentioned declaration and orders:

1. A declaration that upon a proper construction of the Registration (Strata Titles) Act and/or the rules thereunder and/or the By-Laws governing Strata Plan No. 79 that the erection of a Satellite Antenna by the Respondent on the common area of the Strata Plan No. 79 is in breach of the said By-Laws and/or the Registration (Strata Titles) Act and the rules thereunder, which are binding on the Respondent.
2. An Order that the Respondent do forthwith pull down and remove the said Satellite Antenna.
3. An injunction to restrain the Respondent by himself, his servants and/or agents or otherwise from erecting or continuing to erect the said Satellite Antenna upon or over the common area of Strata Plan No. 79.

4. An order that the Respondent do pay the Applicant the costs of and incidental to the Originating Summons.

Affidavit Evidence

Lloyd Hunter, Secretary of the Applicant and who is authorised to swear on behalf of the Applicant states inter alia in an Affidavit dated December 30, 1996 :

".....

3. During July, 1996 the Respondent erected from the balcony of his Strata Lot (Apartment 3 A) a Satellite which protruded over the balcony and onto the common area of the Strata Plan as defined under the Registration (Strata Titles) Act.
4. Neither the Executive Committee of the Applicant nor any member thereof agreed to the installation of the said Satellite Antenna which was erected contrary to the provisions of the Registration (Strata Titles) Act as well as the rules thereunder and the By-Laws governing Strata Plan No. 79.
5. No agent of the Executive Committee of Strata Plan No. 79 agreed with the Respondent to permit him to erect the said Satellite Antenna.

.....

9. The Executive Committee by letter dated the 16th day of July, 1996 wrote to the Respondent and demanded that he remove the said Satellite Antenna.....

....

12. To date the Respondent has refused to remove the said Satellite Antenna.

The Respondent by way of response has stated inter alia in his Affidavit dated 19th February 1997 as follows:

".....

2. That during the month of May, 1996 I had erected on the balcony of my apartment numbered 3A a Satellite system for the use and enjoyment of myself and my family.
3. That the antenna for the system is approximately 3 feet in diameter and is affixed to the inside wall of my balcony.
4. That when the system is not in use it is fully contained within my balcony and when it is in use by virtue of its construction there is a swivel joint which allows for movement.
5. That during use the antenna hangs over my balcony in the air by approximately six(6) inches.
6. That by definition as contained in the Registration (Strata Titles) Act 1969 the antenna does protrude on to the common area of the Strata Lot but swings out in the open space.
7. That I have not breached any by-laws since my system is NOT affixed to the exterior of the building but rather it is affixed to the interior of my balcony.
8. That the system DOES NOT protrude through the walls nor roofs of my strata lot nor the buildings.
9. That in the circumstances I would not require the permission of the executive committee to install the system and any directive of the executive committee for me to remove the system would be totally unfounded.

In response to Singh's affidavit, Dennis Grant, business manager of the Applicant has deposed inter alia:

".....

4. With regard to paragraph 5 of the Affidavit of Dennis Singh I deny that the said satellite dish hangs over his balcony in the air by a mere 6 inches. In fact the satellite dish swivels some 2 to 3 feet over his balcony and

overhangs the common property Strata Plan No. 79. In my daily rounds of inspection of the common property of Strata Plan 79, I have not seen the dish retracted and fully contained within Mr. Singh's balcony."

In addition to the affidavit evidence, the Court has been assisted with photographs of the Lot which houses the satellite antenna and other relevant documents which the parties have relied upon.

Control and Management

The Rules of Strata Plan No. 79 provide in Article (ii) 1 (a) that the Corporation shall control, manage and administer the common property for the benefit of all proprietors. There is also provision that a proprietor shall not:

"2 © place or cause to be placed in the lobbies, vestibules, stairways, elevators and other common areas and facilities of a similar nature any furniture, packages or objects of any kind....

(e) use his Strata Lot for any purpose which may be illegal or injurious to the reputation of the building.

(f) install or have installed any wiring for electrical or telephone installation, television antennae, machines or air conditioning units, or things of a similar nature on the exterior of the buildings or that protrudes through the walls or roofs of his Strata Lot or the buildings except as previously authorised in writing by the executive committee."

Issues

The issues in this case are quite straightforward and in deciding whether or not to grant the declaration and consequential orders the Court will have to decide:

1. Whether the satellite antenna on the balcony is on or extends into common property.

2. What is the meaning of the word installed within the context of Rule 2(f)

of Article 8 above and whether the antenna was installed on the exterior of the building.

3. Whether the balcony for Strata Lot No. 41 forms part of the lot or is it part of the exterior of the building?

Submissions

Mr. McBean submitted that the balcony of strata lot No. 41 was on the exterior of the building. He further submitted that the intrusion of the antenna into common property without prior permission being given amounted to a trespass which would be illegal. Of course he says, that the Court should bear in mind that the respondent has admitted that there was a projection of his antenna from his balcony. Accordingly, it was his view that the declaration and orders sought should be granted.

In response to these submissions, Miss Satterswaite argued that the respondent has done nothing illegal nor has he committed a trespass. She referred to the Certificate of Title registered at Volume 1128 Folio 694 and pointed out where the owners of Lot 41 are the proprietors of an undivided 1/9800th shares in the common property subject to the incumbrance noted. This incumbrance reads as follows:

" By virtue of the provisions of the Registration (Strata Titles) Act 1968 the proprietor holds his lot and his share in the common property subject to any interest affecting the same for the time being notified in the registered Strata Plan subject to any amendments to Strata Lots or common property shown on the Strata Plan."

She submitted that the balcony formed a part of the Strata Lot and contended that the diagram of Lot 41 displayed in Exhibit "L.H 9" shows that its total size is 1134 sq.ft. She further argued that the figure of 1073 sq ft shown also on the diagram was the size of the lot excluding the balcony so, by adding the difference of 61 sq ft to the 1073 sq ft, this results in the total figure of 1134 sq ft.

She further submitted that the phrase " installation on the exterior of the building" referred to in rule 8 (2) (f) (supra) means in this case, installation on the exterior of the balcony for Lot No. 41. The evidence according to her, showed that the antenna was in fact erected within the respondent's balcony and this could not be said to be in breach of the

Rules and Regulations.

Assessment of the issues and findings

Mr. McBean argued that in interpreting the word "install" the Court should not necessarily consider it to mean the point at which the antenna was physically attached but rather to ascribe the meaning "to place something in a position of service."

Vol. 2 of "Words and Phrases" legally defined., has defined the word "install" as follows:

"...installation of machinery or plant. Now installation is a metaphorical word. It is not a word of any great precision. It was well put in the Court of Manitoba in City of Winnipeg v Brian Investments Ltd by Coyne J when he said, ..."Installed is not a word of art nor a word of precision. Indefinitiveness gives it, as it gives any word, a chameleon - like character so that associate words show through and give their colour and meaning to it." It conveys putting in place something already made so that it can be used. There may be an element of assembly required; but basically a thing installed is ready to work when it is put in its place and if necessary connected up." [Engineering Industry Training Board v Foster Wheeler John Brown Boilers Ltd. [1970] 2 All E.R 616 at 620.]

The term "Common property" has been defined in the By-laws of Strata Plan N0. 79 to mean:

"...in relation to the Kingston Mall Strata Plan, the area on such Strata Plan inclusive of the land upon which the buildings are constructed which is for the time being not included in any Strata Lot contained in the said Plan."

A.F Rath on "Strata Titles" has defined common property as follows:

" Common property is a compendious phrase describing all those parts of a parcel which are not the subject of individual ownership - such as the soil beneath the building, the roof and air above, the foyers, stairways and lift wells, the grounds and air-space outside the building. The Act and by-laws provide a code for the use of this common property by the owners in severalty of the various parts of the building."

Re Rule 8(2) ©

Having regards to the definitions of common property (supra) it is abundantly clear that common property does not form part of land which is included in the strata lot, but it includes inter alia, the air space outside the building. I should think, that the figure of 1134 sq. ft shown on the diagram in relation to lot 41, has some significance. By simple mathematical calculation, the total of 61 sq ft and 1073 sq ft shown on the diagram amount to 1134 sq ft. The probabilities are, it would seem, that the balcony is included in the overall size of the lot. It would mean therefore, that the balcony does not form part of the common property and it would be my considered view that the defendant is not in breach of Article 8(2)© of the Rules and Regulations.

Re Rule 8 (2) f)

Mr. Singh has stated in his affidavit that the antenna is approximately 3 ft in diameter and is affixed to the inside wall of the balcony. These facts have remained uncontradicted. He maintains that when the system is not in use there is a swivel joint connected to the antenna which allows for movement and which causes it to be fully contained in the balcony. He admits however that when the system is in use the antenna overhangs the balcony and extends into air by some six (6) inches. The applicants on the other hand are contending however, that the overhang is in the region of some three (3) ft. It has remained uncontradicted also that the antenna has not protruded through any wall nor roof of the strata lot nor building.

It is my view, that the respondent having admitted that his antenna extends beyond the balcony into air (albeit he maintains by a mere six (6) inches) it would be occupying common property when in use. Is the respondent in these circumstances, trespassing since he has not received permission for his antenna to be occupying common property? Does it make a difference that by virtue of the certificate of title, he is a shareholder of the common property subject to the incumbrance noted?

The evidence reveals that the respondent's lot is situate on the second floor. The photographic evidence shows the various positions when the antenna is extended as well as its withdrawal within the balcony. The balcony is covered but there is a space between the roof and ledge for the balcony. It is through this space that the antenna projects. There is a glass sliding door which seems to allow access to the balcony. Can one really conclude that the balcony would be on the exterior of the building? I am of the view that

although the defendant has put the antenna in a position where it can be used from the balcony I would be hesitant to hold that it has been installed on the exterior of the building. I further hold that the evidence does not reveal that this is an installation which causes a protrusion through any wall or roof. In the circumstances I find that the defendant is not in breach also of Rule 8(2)(f). The summons is therefore dismissed with costs to the defendant to be taxed if not agreed.