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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CP.142/86

IN THE MATTER OF Memorandum of Leases H.367644.2 and H.410153

LOW PRIORITY

BETWEEN ANNE HOGG
of Mount Maunganui, Married Woman

Plaintiff

A N D ALEXANDER WILLIAM EDWARDS, Retired, MARTHA EDWARDS his wife and BRUCE ALEXANDER EDWARDS, Landscaper, all of Mount Maunganui

Defendants

Hearing: 18 and 19 April 1989

Counsel: J.W. Olphert for Plaintiff
A.C. Balme for Defendants

Oral Judgment: 19 April 1989

ORAL JUDGMENT OF DOOGUE J.

These proceedings arise out of a dispute between co-owners of the property at 42 Tay Street, Mount Maunganui, with the freehold being owned by the plaintiff and the defendants as tenants in common, with each of the parties

leasing their respective portions of the property under cross-leases from the co-owners.

The defendants were the original owners of the property and subdivided it. The plaintiff's mother was reponsible for erection of the house which the plaintiff now owns. It is accepted by the expert witness for the defendants that the plaintiff's house was purpose-built in respect of the site upon which it is built to take advantage of such views as were available to it. In particular, there is a verandah at the upper level of the house which contains the living quarters of the house. On the north-eastern boundary of the plaintiff's premises, which is the common boundary with the defendants' premises, there is a fence between the properties. On the north-east elevation of the plaintiff's house there is in the upper level, a kitchen which extends from the elevation and contains three windows, with the effect of the extension of the kitchen giving a "bay" effect. On the corner between the north-east elevation and the north-west elevation of the plaintiff's house, there is a dining room which again has bay windows on it. The general outlook from those windows was over the defendants' property and towards the sea, although the view of the sand dunes and the sea was not either close nor extensive. The plaintiff's house is on three levels. Immediately on the defendants' side of the boundary there is a garage so close to the plaintiff's verandah already referred to that one of the defendants' witnesses, without any authority from the plaintiff, jumped from the garage roof to the

verandah. The defendants' residence is on two levels. It had a first floor which extended towards the plaintiff's property with a gable end on the south-west facing wall.

The proceedings arise because the defendants have erected an addition to the first floor part of their premises by extending them towards the plaintiff's property above the garage by some ten feet. The extension, in addition, has a greater area than the original first floor area of the defendant's house. The evidence was that it extends by something over one metre beyond the facade of the original house in a north-east direction. Its roof line is on a higher level than the original roof line. There is now a stucco wall some ten feet closer to the plaintiff's house, which is a bare wall except for a small window in the upper portion of the new gable. In the old wall of the defendants' house, before the extension was added, there was a window on the corner of the house on the south-west facing wall where it adjoins the north-west facing wall. There is no such window in the extended premises.

The cross-leases held by the parties contain a convenant in cl.10 which reads:-

> "NOT TO MAKE STRUCTURAL ALTERATIONS
>
> The Lessee shall not make any structural alterations to the said building nor erect on any part of the said land any building, structure or fence without the prior consent of the Lessors first had and obtained on each occasion PROVIDED

HOWEVER that such consent shall not be unreasonably withheld."

There is no dispute that on about 28 September 1986, there was a discussion between one of the defendants, Mr A.W. Edwards and the husband of the plaintiff. There is a dispute as to the nature and extent of that discussion. It is the evidence of Mr Edwards that he discussed with Mr Hogg an extension above the garage and that Mr Hogg indicated that he and his wife would have no objection to that course and that as a result, the defendants went ahead with the extension. There is some slight support for that summary from a Mr James, another witness called by the defendants. That evidence is in conflict with the evidence of Mr Hogg, which was to the effect that all that was talked about was an extension to the garage. I return to the consequences of that conversation when dealing with the issues in the proceedings.

It must have been that about that time the defendants either had obtained or were about to obtain the consent of the Mount Maunganui Borough Council for their additions because work commenced in respect of the additions on 7 October 1986 or thereabouts.

It is common ground that at no time before the work was commenced was any approach made to the plaintiff for her consent. It is also common ground that at no time were either the plaintiff or her husband shown any plans in relation to the proposed addition.

After the work commenced the plaintiff became concerned as to it and consulted her solicitor and on 17 October 1986, her solicitor wrote to the defendants advising them that she did not consent to the structural alterations to the building and that if work did not cease, immediate action would be taken. It may be that at that stage the framing and roofing-in of the addition was completed, but certainly the addition was not clad.

The defendants did not cease work in respect of the addition but continued with it. As a result, the plaintiff obtained from this Court on 29 October 1986 an interim injunction restraining the defendants:-

> ".....from making or continuing to make structural alterations to the property situate at 42 Tay Street, Mount Maunganui."

There is some dispute as to the nature and extent of any work carried out upon the additions after the injunction of this Court was served upon the defendants on 1 November 1986. There is no evidence before me from which I am prepared to accept, on the balance of probabilities, that any structural alterations were carried out in disobedience of the injunction, notwithstanding that I am satisfied that the defendants did carry out some other work upon the additions after the service of the injunction. The present position is that the additions are totally clad. There may be finishing work required internally, but the external appearance of the additions at

this stage indicates that they are completed, with minor aspects of painting still to be attended to.

There was evidence that the addition fitted in with the defendants' original dwelling and that it did not detract in any way aesthetically from views from the street of the plaintiff's property.

The plaintiff's concern throughout has been primarily two-fold. First, that views from the kitchen windows in particular and particularly the main kitchen window in the centre of the bay, have been seriously affected by the addition with a 100% loss of view through to the sea or near thereto. In addition, there has been some limitation of view from the dining room windows on the corner of the house, although there is a difference of evidence as to that. The further concern of the plaintiff is that the addition constitutes a visual intrusion which was not previously present on the defendants' property by bringing the wall of the defendants' dwelling so much closer to the plaintiff's dwelling. The bulk of the end wall is substantially increased, as is apparent from the photographs before me and in that respect I prefer the evidnece for the plaintiff and in particular Mr Fisher and Mrs Peake, over the evidence for the defendants and in particular, the evidence of Mr Garvie Smith, that the addition has a serious detrimental effect upon the plaintiff's property both in respect of the views and the oppressiveness of the new wall, which was not previously present.

The defendants say that whilst they accept that there may be some limitation in view, there has been a benefit to the plaintiff in respect of privacy, as the original window on the end wall has been replaced by a very much smaller window which has no effect on privacy. The plaintiff's evidence disputed that proposition.

Once again, I prefer the plaintiff's evidence in that respect. I prefer also the evidence of Mr Fisher and Mrs Peake in that I am satisfied that there has been a detrimental effect upon the value of the plaintiff's property as a result of the addition. I find Mr Garvie Smith's evidence unacceptable in respect of his proposition that viewed in the round, there was no detriment affecting the value. Whilst the defendants and Mr Garvie Smith were prepared to accept that there was no detriment to the plaintiff, it was significant that none of them had viewed the addition from the plaintiff's property. In my view, the photographs placed before the Court fully support the evidence of the plaintiff in this respect.

It is against this general background that the three issues which arise in these proceedings have to be determined.

The first issue is whether or not the defendants had the consent of the plaintiff to the addition in terms of the clause in the cross-lease document already set out above. It is submitted on behalf of the defendants that the short discussion between the plaintiff's husband and Mr A.W. Edwards was sufficient to constitute consent. In my view, that cannot

be so however the matter is looked at. First, it is entirely clear in my opinion, that the discussion went no further than the most elementary conversation that the defendants were considering alterations and that they wanted the preliminary view of the plaintiff's husband. I cannot read into that conversation any consent by the plaintiff's husband to the alterations which were subsequently carried out, as it is clear that the plaintiff's husband was at no time fully informed as to the nature of what was proposed. In any event, I am clearly of the opinion that the plaintiff's husband has not been proven to be the agent of the plaintiff for the purposes of the granting of consent. In that respect, Mr Olphert referred me to 22 Halsbury's Laws of England 4th ed., para.1093 and in my view, his submission was correct that the plaintiff's husband was not the agent of the plaintiff. Therefore I am of the clear view that the defendant has not had the consent of the plaintiff to the alterations carried out. One would have expected the defendants to have made available to the plaintiff plans of the proposed alterations and to have obtained consent to those plans in a proper manner. That was never attempted.

The second issue is whether the plaintiff has unreasonaby withheld consent to the structural alterations carried out. It is submitted on behalf of the defendants that the discussion between Mr A.W. Edwards and Mr Hogg was transmitted to the plaintiff and that there was no reaction by her. It is further submitted that the frame was completed

before the letter indicating that the plaintiff did not consent to the alteration was received by the defendants. It was further submitted that at this time the structure is complete, that it can be viewed in the round and that it would be unreasonable to withhold consent to it. Matters already traversed above were mentioned in respect of that submission.

For the plaintiff it was submitted that the issue simply does not arise as the consent of the plaintiff has never been sought and it cannot be said to have been unreasonably withheld. It is further submitted that in any event, as the plaintiff has never been shown the plans, she could not be expected to consent and that at the present time it could not be said, having regard to the matters already traversed, that any consent could be unreasonaby withheld.

In my view, this issue too must be decided in favour of the plaintiff. I uphold the submissions of Mr Olphert. The consent of the plaintiff has never been sought and accordingly, cannot be said to be unreasonaby withheld. In any event, even if it could be said that as a result of these proceedings there must be an inference that the presence of the addition and the attitudes of the defendants constitute a request by the defendants for the consent of the plaintiff, then in my view the plaintiff is fully entitled to withhold consent and that her attitude in seeking the present injunctive relief makes plain that she does withhold her consent. I would not regard that as unreasonable withholding of consent because I accept

the evidence of Mr Fisher and Mrs Peake that when the plaintiff's property was purpose-built for the purpose of having the advantage of the views from the windows and the outlook from the north-west facade of the house, that the present additions of the defendants constitute such an intrusion that no reasonable owner of the plaintiff's property could be expected to consent to it.

The third issue therefore is what remedy should be granted to the plaintiff.

It was submitted on behalf of the defendant that if a remedy was to be granted, it should be a monetary remedy rather than an order for the removal. In the alternative, the defendants through their counsel, suggested that they would contemplate the removal of part of the addition to take the north-west wall of the addition back to the line of the original house. The plaintiff has had no opportunity whatever to consider that proposition, which was raised by counsel in his final submissions. Without expressing any opinion on it whatever, it does seem to me that it would create other problems which would require consideration by the plaintiff if that was the proposal of the defendants.

For the plaintiff, Mr Olphert submits that the appropriate remedy is a mandatory injunction, as sought in the statement of claim. He submits that, having regard to the breach of the negative covenant, that is appropriate and he

referred me to various references in Spry on Equitable Remedies, 2nd ed. pp.365, 366, 482, 483 and 499 and to 24 Halsbury's Laws of England 4th ed., paras. 930, 931, 946, 947 and 950. It was implicit in his submissions that the injunction should be granted as the defendants had carried on with the work after receiving the solicitor's letter of 17 October 1986, being fully aware at that date that the plaintiff did not consent to the work and then - after the injunction had been served upon the defendants - they continued with further work to the additions, even if not necessarily of a structural nature. Alternatively, he submitted that if damages were to be the remedy, then the assessment by Mr Fisher of $15,000 was fair and appropriate.

In my view a mandatory injunction is the only remedy that does justice between the parties in these proceedings. If the matter had been held to be one capable of monetary compensation then I would have awarded damages in the sum of $15,000 as assessed by Mr Fisher. In my view however, the defendants have, by their own actions, made an injunction inevitable. They at no time made available to the plaintiff the plans of the proposed alterations. They took the view that what they were proposing was reasonable and that therefore it was only reasonable that the plaintiff should consent, but they took no steps to obtain her consent to precisely what was proposed. Once they were aware that the plaintiff did not consent to what they were doing, they still continued with the

work. They closed in the additions at that stage completed and they have at all times contested the present proceedings.

For justice to be done, the parties have to be put back into their original situations. At that time, if the defendants seek some other additions to the building other than the one that they have carried out, they can obtain the approval of the plaintiff in the ordinary way. I do have regard however, to the fact that the defendants at the late stage of counsel's final submissions, have proposed some compromise.

I think therefore, the apprpriate order for me to make is to grant an injunction, not in the terms sought in the statement of claim, but that the defendants do remove so much of the building on the land at 42 Tay Street, Mount Maunganui, as contained in Certiticate of Title Volume 26B Folio 428, as has been erected in or about the months of October to December 1986 without the consent of the plaintiff and to restore the building to its condition prior to those alterations. There will be leave to apply further in respect of the precise wording of the order.

I think it also appropriate that the order should lie in Court for at least one month in case the parties are able to reach some other conclusion acceptable to both the plaintiff and the defendants when the liberty to apply would enable, if the parties agree, some other agreed relief.

The plaintiff will have her costs in the sum of 3,000 dollars, together with disbursements to be fixed by the Registrar in terms of Item 34 of the Second Schedule to the High Court Rules.

Solicitors for Plaintiff: Messrs Holland, Beckett, Maltby, Tauranga

Solicitors for Defendants: Messrs Cooney, Lees and Morgan, Tauranga