

**BILO LTD and 2 Ors v CAMIRA HOLDINGS LTD and Anor**

HIGH COURT — CIVIL JURISDICTION

5 SINGH J

4 October 2002

[2002] FJHC 257

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**Real property — boundaries — injunction — where balance of convenience lies — interpretation of the word storey — extension done on sloping ground — Town Planning act 1978 (Cap 138).**

15 The Plaintiffs and the 1st Defendant were lessees of residential properties. The Plaintiffs sought an injunction to restrain the 1st Defendant from undertaking or carrying out any building works whatsoever relating to the extension of the existing building on its land. The parties agreed that the continuation of that injunction will depend on the resolution of the issue. The issue before the court was whether the word storey was used in its simple meaning or given an artificial meaning.

20 **Held** — (1) In the absence of any definition, the diagrams given in the Building Codes provide the best guidance as to what constitutes and what does not constitute a single storey or two-storey structures. The word storey appears to have a unique meaning when used in General Provisions. Having visited the site and having seen the photographs and various diagrams in the Building Codes, this is a single storey extension.

25 (2) The Code does not define the word storey. However, it contained examples in outline forms of what a single storey and two-storey look like.

(3) An interim injunction is a temporary and exceptional remedy available before rights of parties have been fully determined. In the present case, the interim injunction granted was in the absence of any affidavits filed by Defendants. The balance of convenience lies heavily in favour of dissolving the interim injunction

30 Interim injunction dismissed.

**Cases referred to**

*American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; [1975] UKHL 1; *Grant v Langston* [1900] AC 383, considered.

35 *N. Prasad* for the Plaintiffs

*S. Lateef* for the 1st Defendant

*K. Muaror* for the 2nd Defendant

**Decision**

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**Singh J.** By summons dated 19th August 2002 the Plaintiffs are seeking:

- (a) an injunction restraining the 1st Defendant from undertaking or carrying out any building works whatsoever relating to the extension of the existing building on its land at 107 Queens Road, Lami;
- 45 (b) an order that the 2nd Defendant revokes the building permit it issued to the 1st Defendant and to forthwith issue a stop notice;
- (c) costs of the action.

**Facts**

50 The Plaintiffs and the 1st Defendant are lessees of residential properties in Lami close to the Tradewinds Hotel. The 2nd Plaintiff's property is on top of a small hill, the 1st Plaintiff's at bottom of the hill with a sea frontage. In between

the two is the land of the 1st Defendant. The residence of the 2nd Plaintiff is not visible from the 1st Defendants' property due to nature of terrain and prolific growth of trees around the area. Only the roof of the 1st Plaintiff's house is visible from the 1st Defendant's residence again due to nature of terrain and trees.

5 The 1st Defendant had some time either in February or March 2002 (the exact time cannot be pinpointed) began to carry out certain extension to his dwelling house without proper approval. Later this was rectified.

The Plaintiffs' first complain is that the 1st Defendant has not provided adequate setback from the boundary, in other words he is building too close to the  
10 boundary in breach of the regulations.

The parties agree that the setback at present is 2 meters from the boundary. It is also agreed that the minimum regulated setback for single storey building is 1.8 meters from the side boundary and 3 meters for a two-storey building.

15 On 21st August 2002 Scott J had granted a very limited interlocutory injunction restraining the 1st Defendant "not to progress any works within three meters of the boundary until further order of this Honourable Court". At the time he had only the affidavit in support of the motion before him.

### 20 **Single storey or two-storey**

The parties agree that the continuation of that injunction will depend on the resolution of the issue whether the proposed extension is a single-storey or two-storey and any preliminary view the court has about this issue.

25 The court has the advantage of having before it a number of affidavits including photographs of the proposed building and diagrams of houses. I had the advantage of visiting the site with counsels, parties and some of the deponents to the affidavits.

The properties in question are within Lami Town boundary. The word "storey" is not defined in the Town Planning Act 1978 Cap 138 nor in the Public Health  
30 Act nor in the Town Planning Scheme General Provisions 1999 all of which were referred to in the affidavits and the submissions.

The issue before the court is whether the word "storey" in the General Provisions 1999 is used in its simple meaning or given an artificial meaning. To understand the meaning one has to look at the subject matter in respect of which  
35 the word is used.

A rather interesting discussion of such approach was considered by the House of Lords in *Grant v Langton* [1900] AC 383 where when discussing the meaning of the word "house" Lord Earl of Halsbury at 390 said as follows:

40 *A hundred years ago there was not much difficulty in saying what was a "house" but builders and architects have so altered the construction of houses, and the habits of the people have so altered in relation to them that the word is no longer the expression of a simple idea; but to ascertain its meaning one must understand the subject matter with respect to which it is used in order to arrive at the sense in which it is employed in a statute.*

45 The Town Planning Act and the General Provisions deal with a host of specialised matters in relation to orderly and controlled development of towns and rural areas. The schedule to the Town Planning Act (ss 7 and 8) relates to matters which may be dealt with by General Provisions. At the stage of planning, town planners, engineers and architects have a significant role to play and  
50 references they use therefore become important in interpreting meanings or giving sense to a word.

Stuart Huggett who is a registered architect of considerable experience in his affidavit sworn on 20th September 2002 deposed that the Home Building Manual and the Town Planning Act are silent as to the definition of the word “storey”. However, he deposed that the current basement in 1st Defendant’s extension work is capable of becoming a habitable space without building any additional structure and therefore is a storey on its own. He considered habitability as the criterion for deciding the issue of storey.

Vijay Sharma who is also an architect swore an affidavit on 20th August 2002. In it he attached examples of different types of buildings which he uplifted from the Fiji Building Code. From that he concluded that the proposed extension was one-storey. In his additional affidavit sworn on 29th August 2002 he annexed an extract from New Zealand Builders Code to support his conclusions.

The Town Planning Act deals with development schemes, zones etc. It lays guidelines which an intending developer must follow. The plans for home are approved by Town Councils and Rural Local Authorities. The General Provisions outline and fix certain standards so there is uniformity and some semblance of certainty. The Town Councils and Rural Local Authorities have an important function to perform in approving plans. They have to interpret the General Provisions. The architects, builders and engineers too are guided by General Provisions.

Reference was made to Fiji Building Code. That code again does not define the word “storey”. However, it contained examples in outline form of what a single storey and two-storey house look like. The New Zealand Building Code also gives outlines of what a single and two-storey look like.

One common thread which emerges from inspection of outlines in the two codes is that if the bottom floor or base of the building is on a slope and excavations are not done to even or level the slope then the building is described as a single-storey. The terrain appears to be the decisive factor in distinguishing the single storey from the two-storey.

The New Zealand Code is more detailed in one significant way. It contains the description not definition of single-storey as follows:

*Single-storey buildings may include a part storey basement or a part storey in the roof space. Single-storey buildings shall be supported on any one or a combination of the following foundation structures:*

- (i) Piles
- (ii) Foundation walls
- (iii) Concrete s-Pab on ground.

This is a description not a definition.

In the case before me the extension done is on sloping ground. There are piles constructed on the lower end of the slope and upper end of floor is resting on the ground. There is a septic tank on the ground where extension is carried out; there is hardly any ventilation from three sides. It is a most unlikely place for human habitation especially with a septic tank thrown in.

In the absence of any definition, the diagrams given in the Building Codes provide the best guidance as to what constitutes and what does not constitute a single storey or two-storey structure. The situation before me is akin to that of an elephant — being able to describe it but not define it. The word storey appears to have a unique meaning when used in General Provisions.

Having visited the site and having seen the photographs and various diagrams in the Building Codes I am of the view, in light of material before me now, that this is a single storey extension and therefore the proper setback is at least 1.8 m not 3 meters.

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### Consent of director

Mr Nilesh Prasad, counsel for the Plaintiff further submitted that the Defendants breached s 7(3) of the Town Planning Act because consent of the Director of Town and Country Planning was not obtained.

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Section 7(1) and (3) read as follows:

*7 (1) Subject to the provisions of this action, the permission of the local authority shall be required in respect of any development of land carried out within a town planning area during the period before a scheme affecting such area has been finally approved.*

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*(3) The local authority shall not grant or refuse permission under this section without the prior consent of the Director and the Director may approve such grant or refusal either unconditionally or subject to conditions and may prohibit such grant or refusal. (Substituted by 14 of 1961, s 4)*

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The setback on the ground is 2 meters. If the 1st Defendant had requested for a setback below the minimum standard that is less than 1.8 m, then the consent of director would be required. There was no need for dispensation from the approved scheme and hence no consent. Gillian Margaret Hugget who swore the affidavit on 16th August 2002 on behalf of the plaintiff was of the view that the building was two-storey and therefore proper setback was 3 meters. This is the reason why she thought that dispensation from Director of Town and Country Planning was required. I am of the view no such consent is necessary.

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Reference was made to Fiji Building Code. That code again does not define the word "storey". However, it contained examples in outline forms of what a single storey and two-storey look like. The New Zealand Building Code also gives outlines.

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What is to happen to the injunction. An interim injunction is a temporary and an exceptional remedy available before rights of parties have been fully determined. In the present case the interim injunction granted was in absence of any affidavits filed by Defendants and before the court was appraised of nature of case for the Defendants. The plan for extension has now been approved by Lami Town Council, the controlling authority. The 1st Defendant has already carried out substantial portion of work. The real issue is of balance of convenience.

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In *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; [1975] UKHL 1 at 511 Lord Diplock said:

*If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case revealed by the affidavit evidence adduced at the hearing.*

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From this quote it appears it is proper for courts to look at the relative strength of parties' case as disclosed by affidavits. The only caution would be not to engage in any prolonged investigation at this interlocutory stage. Interlocutory applications arise all of a sudden and are meant to be disposed of quickly so any prolonged investigation is unwise.

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I am of the view that the balance of convenience lies heavily in favour of dissolving the interim injunction granted on 21st August 2002. The interim injunction is dissolved. With costs to be in the cause.

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*Interim injunction dismissed.*

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