1987 March 11

(A LOIZOU LORIS PIKIS JJ)

P & A ENTERPRISES (LARNACA) LTD .

Appellants-Plaintiffs

v

LOUIS TOURIST AGENCY LTD .

Respondents Defendants

(Civil Appeal No 6840)

Civil Procedure—Pleadings—One should not leap before one comes to the stile – Departure from previous pleading—Meaning of

Civil Wrongs – Trespass to immovable property – Section 43 of the Civil Wrongs Law, Cap 148 – Installation of an aerial on the terrace at the top of a multi-storey building by the lessees of a storey without the consent of the possessors of the terrace – Once the unlawful interference has been established, it was incumbent on the defendants (lessees) to show that the act was not unlawful

Immovable property – Horizontal ownership – The Immovable Property (Tenure Registration and Valuation) Law, Cap 224 – Section 6 sub sections (1) and (2) as amended by s 2 (a) and 2(b) of Law 16/80 – Terrace on the top of a multi-storey building – In this case it is not the roof of the whole building referred to in s 6(2)—Absence of evidence that the "terrace" was specified as of common use in the relevant division permit of the building – In the circumstances the terrace is not of common use

The appellants-plaintiffs brought an action for trespass against the respondents-defendants, alleging in the statement of claim that the latter unlawfully and without their consent interfered with their possession of a terrace on the top of a multi-storey building and installed thereon an aerial. The respondents alleged in their defence that being the lessees of tenements in the said building leased to them by the appellants they installed the aerial in virtue of (a) The express and/or implied consent of the appellants, (b) An express and/or implied term of the relevant contract of lease, (c) operation of law, as the installation tantamounts to fundamental use of spaces allocated for common use in the building aforesaid. The appellants in their reply denied, inter alia, having ever acquiesced to the installation of the aerial in question and maintained that under the contract of lease such installation would require their consent in writing, which was never given.

At the hearing of the action the appellants called a single witness, who inter alia, speaking about the terrace, laid stress on the fact that «it is locked and anyone has no right to go up there» (Η ταράτσα είναι κλειδωμένη και δεν δικαιούται να βγαίνει οιοσδήποτε πάνω). The respondents did not call any evidence.

The trial Judge concluded that by their reply the appellants departed from the initial cause of action, that is trespass, and attempted to build a case of breach of contract of lease, that there was no evidence of trespass, that there was no breach of the contract of lease, as the lease related only to the ground and first floors of the building and that the terrace was allocated to the common use of all «possessors» of the several storeys of the building pursuant to s 6(2) of Cap.224 As a result the trial Judge dismissed the action. Hence the present appeal

Held, allowing the appeal: (1) There has been no «departure in pleading» in connection with appellants' reply In drafting a pleading it is not necessary to anticipate the answer of the adversary To do so according to Hale C J. is «like leaping before one comes to the stile» The allegation in the reply that the installation in question would, under the contract of lease, require appellants' consent in writing constituted an answer to an allegation in the defence. Such answer could not be included in the statement of claim because that would in effect be «like leaping before one comes to the stile»

(2) Trespass to immovable property is governed by s.43* of Cap. 148. From the provisions of s 43(1) it is clear that every unlawful interference with the terrace in question constitutes a trespass The evidence established that the terrace was in the possession of the appellants and that the aerial was installed without their consent It follows that there was evidence of trespass.

(3) Once the alleged unlawful interference was established it was incumbent on the respondents (s 43(2)) to show «that the act of which complaint is made was not unlawful». The allegation that the respondents acted under an express and/or implied consent of the appellants was rebutted by appellants' single witness. There cannot be traced in the contract of lease (produced at the trial) any express or implied term allowing the respondents the use of the terrace. It follows that what remains to be examined is whether s 6(2) of Cap. 224 justifies the interference in question.

(4) The relevant provisions are those contained in sub-sections (1) and (2)** of s.6 of Cap. 224, as amended by s 2 (a) and 2(b) of Law 16/80. Section 6 regulates the ownership of storeys held in horizontal ownership. What the tenant of a storey in a multi-storey building gets? That would depend on the terms of the lease but in any event he could not get more than the lessor would be himself entitled to. In the case under consideration the respondents could get only what was stipulated in the lease, a question that has already been examined.

Even assuming that the respondents were the owners of the ground and first floors, the installation in question would not have been justified under s.6(2), because the "terrace" in question is not the roof of the whole building referred to verbatim in s.6(2) and there is no evidence that the terrace was

* *Quoted at p 149 post*

** *Quoted at pp 151-152 post.*

allocated for common use in the divison permit of the building

Appeal allowed with costs

Injunction in terms of prayer (a)

Cases referred to
Ward v Roubina (1970) 1 C L R 88

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Ioannides, D J) dated the 20th October, 1984 (Action No 3167/82) whereby their action against the defendants for trespass to the terrace on the top of a multi-storey building in Nicosia was dismissed

L Papaphilippou, for the appellants

P Ioannides, for the respondents

Cur adv vult.

A LOIZOU J The Judgment of the Court will be delivered by Loris J

LORIS J The present appeal is directed against the judgment of a Judge of the District Court of Nicosia (A Ioannides D J) in Action No 3167/82, whereby the aforesaid action of the appellants-plaintiffs against the Respondents-defendants, founded on alleged trespass to the terrace on the top of a multi-storey building abutting Evaghoras and King Paul A' Avenues in Nicosia, was dismissed, with costs

The nature of appellants' claim as it transpires from the pleadings, is to the effect that the respondents unlawfully and without the consent of the appellants who were the lawful possessors thereof at the material time, interfered with the terrace on the top of the aforesaid multi-storey building and installed

thereon an aerial which the respondents failed and/or refused to remove in spite of the fact that they were called by the appellants to do so.

The plaintiffs alleging that they as a consequence thereof have sufferred special damage totalling £150.- claim an injunction restraining the respondents from interfering as aforesaid with the terrace in question as well as damages for trespass.

The respondents in their defence – a very wide pleading indeed – maintain inter alia that being the lessees of tenements within the aforesaid multi-storey building, leased to them by the appellants, have installed the aerial in question on the terrace on the top of the said building in virtue of:

(a) The express and/or implied consent of the appellants.

(b) An express and/or implied term of the contract of the aforesaid lease which allegedly confers on them the right of use and enjoyment of places allocated for common use on the building in question, including the use and enjoyment of the roof thereof.

(c) Operation of law, as allegedly the installation of the aerial in question tantamounts to fundamental use of spaces allocated for common use in the building aforesaid.

The appellants in their reply deny, inter alia, having ever acquiesced, either expressly or impliedly, to the installation of the aerial in question, which they term as wireless aerial attracting lightnings and maintain that such an installation would, under the contract of lease, require their consent in writing, which was never given.

At the hearing of the action in the Court below, the appellants called a single witness, namely Pantelis Demetriou, managing director of appellant company. He gave evidence viva voce and produced (i) the contract of lease (exh. 1) executed on the 17th April 1970, whereby the appellants as lessors leased to the respondents 5 shops on the ground floor and the whole of the 1st floor of the building in quesiton, which consists of the ground floor and five more floors. (ii) The letter of counsel for respondents dated 26.4.82 (exh. 2) in reply to a letter of 26.3.82 addressed by

counsel for appellants to respondents requesting them to remove the said aerial they have installed.

We shall confine ourselves at this stage to note that in the letter of 26.4.82 (Exh. 2) counsel for respondents states on their behalf:

> "Our clients did not commit any unlawful interference with the terrace of the multi-storey building of your clients. The installation of an aerial on the terrace is a fundamental use of space of the building allocated for common use, to which our clients are absolutely entitled..."

The said single witness called by the appellants stated viva voce the following inter alia:

The respondents leased initially from the appellants the shops on the ground floor as well as the whole 1st floor. This lease is referred to in Exh. 1. Later they have also leased from the appellants an office only situated on the 2nd floor. This latter lease was embodied in another contract of lease (which was not produced).

In this multi-storey building, which consists of the ground floor and 5 more storeys – there exist four terraces. The three out of the four, which should be properly described as verandahs and not terraces, are situated on the 1st floor and they are being used by the respondents. The 4th one is actually a terrace and is situated on the top of the building, on the roof.

The witness speaking about this latter terrace laid stress on the fact that "it is locked and anyone has no right to go up there." (Η ταράτσα είναι κλειδωμένη και δεν δικαιούται να βγαίνει οιοσδήποτε πάνω). It is on this terrace that the witness observed some time in February or March 1982 that the respondents had installed the aerial in question; the aerial is 6 metres high and is supported by moulds penetrating into the terrace.

The witness went on to say that the respondent did never ask or obtain from the appellants oral or written consent for such installation and that they refused to remove it after oral requests and request in writing through appellants' counsel before action. He concluded that the aerial in question is still there on the terrace.

After the evidence of this witness counsel for appellants-plaintiffs closed his case. Counsel for respondent-defendants stated that he does not intend to adduce any evidence whereupon counsel for appellants addressed the court; counsel for respondents addressed the court submitting that the appellants failed to prove their case.

The trial judge in his considered judgment after examining the effect of the pleadings concludes that the appellants by means of their reply have departed from their initial cause of action, which was trespass to land and attempted to build up a case for breach of the contract of lease by the respondents.

After holding that (a) there was no evidence of trespass whatever; (b) There could have been no breach of the contract of lease (Exh. 1) as it referred to the lease of ground floor and 1st floor buildings only whilst the complaint of the appellants was in respect of unlawful interference with the terrace on the top of the whole building, which was not included in the contract of lease; (c) the terrace on the top of the building is a space allocated for the common use of all "possessors" of the several storeys of the building pursuant to the provisions of s. 6(2) of the Immovable Property Law, Cap. 224 dismissed the action with costs against the appellants.

Hence the present appeal the grounds of which are briefly the following:

1. The Court erred in holding that the reply constituted a departure from the initial cause of action.

2. The Court erred in holding that the installation of the aerial in question on the terrace did not constitute unlawful interference with the terrace.

3. The Court erred in holding that the terrace on the top of the building is a space allocated for common use in the absence of any evidence to that effect.

4. The Court misconceived the provisions of s. 6(2) of Cap. 224.

Learned counsel for the appellants elaborated at length with the effect of the pleadings and argued forcefully that the evidence adduced which stands uncontradicted proves the case of the appellants; he submitted that in view of the provisions of s. 43(2)

of the Civil Wrongs Law, Cap. 148 and in view of the fact that exh. 1 could not be of any assistance to the respondents and taking into consideration that the respondents did not adduce any evidence, there could have been no other result but a judgment in favour of appellants for an injunction as per para (a) of the prayer in the action, in view of the fact that the claim for damages has been abandoned during the hearing of the action.

Learned counsel for the respondents strenuously argued that the express and/or implied terms of the contract of lease (exh. 1) confers on the respondents the right of use and enjoyment of the terrace in question which is a place allocated for common use and enjoyment to occupiers of the several storeys of a building pursuant to the provisions of s. 6(2) of Cap. 224.

We have considered the judgment of the trial judge after having gone very carefully through the record, but we find ourselves unable to agree with him.

In the first place we could not trace any "departure in pleading" in connection with the reply as found by the trial judge.

> "A departure takes place when in any pleading the party deserts the ground that he took up in the preceding pleading, and resorts to another and a different ground" (Odger's Pleading and Practice 22nd ed. p.212).

A summary of the effect of the pleadings appears at the beginning of this judgment.

It is abundantly clear from the statement of claim that the action of the appellants was an action on trespass to land; their complaint was unlawful interference with the terrace in their possession, such interference having been caused by the alleged unlawful installation thereon by the respondents of the aerial in question. The statement of claim contained the material facts, in respect of such complaint, which should be pleaded at the time.

In this connection it must be borne in mind that "the pleader should never allege any fact which is not material at the present stage of the action, even though he may reasonably suppose that it may become material hereafter ..... It is not necessary to

anticipate the answer of the adversary; to do so according to Hale C.J. is 'like leaping before one comes to the stile.'

It is no part of the statement of claim to anticipate the defence and to state what the plaintiff would have to say in answer to it..." (Odger's supra at p. 101).

As already stated the respondents in their defence alleged inter alia that they have installed the aerial in question in virtue of an express and/or implied term in the contract of lease (exh. 1).

The appellants in view of the aforesaid allegation in the defence stated in their reply that the installation in question would, under the contract of lease, require their consent in writing, which was never given. It is quite clear that the latter allegation of the appellants was raised in answer to the relevant allegation of the defence. It is obvious that it could not be raised in the statement of claim because that would in effect be «like leaping before one comes to the stile». We need not go further and examine the strict necessity of the reply in this particular case in view of the fact that there was no counterclaim, but we shall confine ourselves in stating this much: We hold the view that the reply as pleaded cannot be considered by any stress of imagination as constituting a departure from the statement of claim; definitely it does not desert the ground of trespass and cannot be considered as «resorting to another and different ground». It simply attempts to strengthen the original ground by depriving the respondents from one of their defences.

Turning now to the gist of the case under the present appeal notably trespass to the terrace in question. Trespass to immovable property is dealt with under s. 43 of our Civil Wrongs Law, Cap. 148 which reads as follows:

"43. (1) Trespass to immovable property consists of any unlawful entry upon, or any unlawful damage to or interference with, any such property by any person.

(2) Where the acts complained of are permitted by local custom, such custom, if established shall be a defence but in any action brought in respect of any trespass to immovable property the onus of showing that the act of which complaint is made was not unlawful shall be upon the defendant."

It is clear from the provisions of s. 43(1) above, that every unlawful interference with the terrace in question constitutes trespass to the said terrace.

In this connection the only evidence adduced is that of the single witness called by the appellants who testified on oath and his evidence stands uncontradicted, the respondents having chosen to adduce no evidence whatever

This evidence is to the effect that the terrace in question which was in the possession of the appellants, (admitted even by the respondents in their letter (ex. 2) – kept under lock and key – was interfered with by the respondents having installed thereon, without the consent of the appellants oral or written, the aerial in question which is supported by moulds penetrating into the terrace.

It is therefore clear that the court below went wrong in holding that no evidence whatever was adduced in respect of trespass on the terrace; we hold the view that the said evidence adduced by the appellants, which stands uncontradicted proves the trespass alleged by the appellants on their terrace.

The appellants having thus established the alleged unlawful interference with their aforesaid terrace it was incumbent on the respondents, pursuant to the provisions of s. 43(2) above, to show «that the act of which complaint is made was not unlawful». As already stated the respondents did not adduce any evidence whatever. As the oral evidence of the single witness called by the appellants does not only prove trespass on the terrace but also rebuts the allegation of the defence that the respondents acted under an express or implied consent of the appellants, it remains to consider the remaining two legs of the defence notably (i) express and/or implied term in the contract of lease allegedly allowing the respondents the use and enjoyment of the terrace in question; (ii) justification of the tresspass on the terrace by operation of law pursuant to the provisions of s.6(2) of Cap. 224.

The contract of lease was produced in the court below and was marked exhibit 1. We have gone carefully through exh. 1 and we must say that we could not trace in it any express or implied term

allowing to the respondents the use and enjoyment of the terrace on the top of the multi-storey building in question, on the contrary it was pointed out by learned counsel for appellants and we are inclined to agree with him, that para 7 of the lease (exh 1 excludes expressly even the placing on the said terrace of an advertisement or poster either electrical or otherwise

It remains to consider the alleged justification of the installation of the aerial in question on the terrace by operation of law, that is in virtue of the provisions of section 6(2) of Cap 224

Section 6 of the Immovable Property, Tenure Etc Law Cap 224 originally comprising of four sub-sections was amended by s 2 of Law 16/80, it is now comprising of six sub-sections altogether the relevant sub-sections 6(1) and 6(2) as amended by s 2(a) and 2(b) of Law 16/80 read as follows (I have inserted in brackets the relevant amendments in their proper perspective)

«6(1) When a building consists of more than one storey, each storey (or part of a storey) (η τμήμα οροφου) which can properly and conveniently be held and enjoyed as a separate and self-contained tenement, may be owned held and enjoyed separately as private property

(2) The site on which the building is standing, the foundations thereof, the main walls supporting the whole building, its roof the main staircase leading to the various storeys, (Ο ανελκυστηρ εάν τυχον υπάρχει τοιούτος οι κυριοι διάδρομοι αυτού) ("The lift if there is one, the main corridors thereof") and any part of the ground or building which is of common use to the owners of the various storeys (ή τμηματων αυτών και οιουδηποτε του εδάφους ή της οικοδομής το οποίον ήθελε καθορισθή η ορίζεται ως ούτω κοινόχρηστον εν τη αδεία διαχωρισμού της οικοδομής η οποία εξεδόθη υπό της αρμοδίας αρχής δυνάμει των διατάξεων του περί Ρυθμίσεως Οδών και Οικοδομών Νόμου ή των δυνάμει τούτου εκδοθέντων Κανονισμών) («or parts thereof and any of the ground or the building which may or is defined in the division permit of the building, which was issued by the competent authority pursuant to the provisions of the Streets and Buildings

Regulation Law or the Regulations issued thereunder as being of such common use») shall be owned, held and enjoyed by all of them in undivided shares"
(3).....(4)..... (5).....(6).....

Undoubtedly section 6 of Cap. 224 regulates the ownership of storey held in horizontal ownership (*Ward v. Roubina* (1970) 1 C.L.R. 88).

The wording of s. 6(2) referring in clear and unequivocal terms to ownership provides the various parts of the building and the site, which shall be of common use to the owners of the various storeys. Some of the various parts of the building are allocated for common use verbatim e.g. the main stair case, the roof of the building; whilst other parts are not so enumerated but they are to be found in the division permit of the building issued by the appropriate authority.

Now assuming that the owner of a storey in a multi-storey building leases his storey. What would the tenant get? That would depend on the lease; but definitely whatever the terms of the lease he could not get more than the lessor would be himself entitled to.

In the case under consideration the respondents could get only what was stipulated in the lease. And as already stated we could not trace in exh. 1 any express or implied term allowing to the respondents the use and enjoyment of the terrace on the top of the multi-storey building in question.

The learned counsel for respondents argued inter alia that s.6(2) of Cap. 224 confers on the respondents the right of use and enjoyment of the terrace in question. He laid stress to the provision allocating for common use the roof of the whole building. In the first place the rights of the respondents are derived from the contract of lease; but assuming that respondents were the owners of the 1st floor would they be entitled to the terrace in question? It must be made quite clear: the terrace we are concerned is merely a terrace described sometimes as "terrace on the top" or "terrace on the roof". It is not the roof of the whole building referred to verbatim in section 6(2) of Cap. 224; and what is worse for the respondents is a terrace "kept under lock and key".

On the other hand it was neither alleged nor proved that the terrace in question was allocated for common use in the division permit of the building.

For the above reasons the alleged justification of the installation of the aerial in question on the terrace, by operation of s. 6(2) of Cap. 224 is doomed to failure as well.

In the result the appeal succeeds for the reasons stated above and the judgment of the trial court dismissing the action and adjudging the plaintiffs-appellants to pay the costs is hereby set aside.

As the plaintiffs have abandoned their claim for damages and as the unlawful interference by the respondents on the terrace in question which commenced some time in February or March 1982 was still being continued down to the hearing of the action under appeal, judgment and order is hereby entered as per paragraph (a) of the prayer in favour of the appellants and against respondents; costs here and in the court below to follow the event of this appeal.

Appeal allowed.