

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION

3 Cause No: G 0013/2018

4
5 BETWEEN:

6 PROPRIETORS STRATA PLAN #126

7
8 PLAINTIFF

9
10 AND:

11 DANIEL LOWE

12 FIRST DEFENDANT

13
14 LORRAINE LOWE

15 SECOND DEFENDANT

16
17 Appearances:

Mr. John Meghoo on behalf of the Plaintiff

18
19 Defendant in Person

20
21 Before:

The Hon. Justice Cheryll Richards Q.C.

22 Heard:

10th July 2019

23 Judgment:

2nd August 2019

24
25 HEADNOTE

26 *Civil Law - Breach of Restrictive Covenants, Implied or Express Easements,*
27 *Strata Titles Registration Law.*

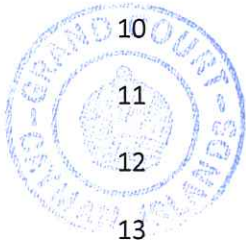
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29
30 JUDGMENT

1 INTRODUCTION

2 1. On the 22nd July 2015, the Defendants, Daniel Lowe and his wife Lorraine Lowe became
3 the registered joint proprietors of Block 22E, Parcel 183 H1. This is apartment number
4 9, Prospect Legacy Apartments, Phase Two in George Town, Grand Cayman (“the
5 property”). This apartment is one of a block of six apartments. There are other units
6 sequentially numbered in another block in Phase One.

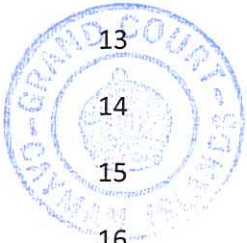
7
8 2. The origin of title on registration of the property is recorded in the Land Register as
9 being by First Registration, Mutation no. Strata Plan 126. The Register also records that
10 the title to the property is subject to the restrictive agreements as listed in the Bye-laws
11 for the said Strata Plan and any amendments thereof. The apartment is therefore
12 registered as a strata lot pursuant to the Strata Titles Registration Law (2013 Revision).
13 This Law was originally enacted in 1973.

14
15 3. Mr. Lowe and his wife took actual possession of the property on the 12th June 2015. On
16 moving in, Mr. Lowe considered the outside areas of the property to be insecure, bare,
17 unkempt and unattractive. He is an avid gardener and embarked on a series of privacy,
18 security and beautification activities designed he says to enhance the property, make it
19 more secure and improve its condition. These activities included, re-staining the front
20 door of his own property, in a different color from the other five units, putting down
21 pavers at his front door, and affixing a security camera to the outside of his apartment.
22 Subsequently he planted various flowers by the wall to his unit and placed red and yellow
23 bricks to create a border around them. He planted several fruit trees in the yard of the
24 complex, and fully enclosed a previously partially enclosed area to the rear of his
25 apartment by using board fencing material and two doors which had been discarded by
26 the owners of a neighboring property. He had keys made for those doors and locked



1 them. Inside of this now fully enclosed area, he planted more plants and flowers. He
2 produces before-and-after pictures of the areas and considers that they have been
3 upgraded and enhanced. He spoke with pride of the many compliments that he has
4 received from passers-by when they walk their dogs and questions the Godliness of
5 people who do not like flowers.

6
7 4. The Plaintiff, Proprietors Strata Plan 126, is the Strata Corporation for the said
8 Apartment Complex (hereinafter referred to as “the Corporation”). It appears before the
9 Court through its management entity, Estate Management Services represented by its
10 managing director Lavinia Jones. The Corporation responded with concern to Mr.
11 Lowe’s activities. It asserts that Mr. Lowe did not have the permission of the Corporation
12 to carry out these exterior activities and that some of the work which he has done, for
13 example with the brick borders around the plants is not up to standard. It appears that
14 the Corporation tried initially to reach compromise positions with Mr. Lowe. The
15 Corporation caused all the other five front doors to be re-stained to match the color used
16 by Mr. Lowe, removed the pavers which he had put down, and gave after-the-fact
17 permission to him to install security cameras. The Corporation tried to reach an
18 agreement with him to transfer to the Strata the management of the trees and plants
19 which were planted on Common Property without permission. The tipping point for the
20 Corporation is not only that the enclosure completed by Mr. Lowe extends beyond his
21 own patio and into the Common Property of the Strata but that within that particular area
22 of the Common Property is the septic treatment plant for the entire complex. In order to
23 access the septic plant, to carry out its maintenance duties, the Plaintiff, must either
24 obtain a key from Mr. Lowe or request of him in advance to leave it open for inspection
25 or for access by workmen.



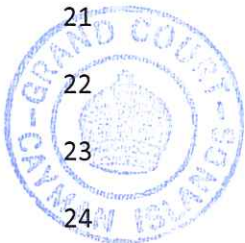
1 5. Following a letter to Mr. Lowe and his wife on the 20th October 2015 from the
2 Corporation's Attorneys, an annual general meeting on the 19th March 2016 at which
3 Mr. Lowe was present and a further letter to the Lowes on the 22nd February 2017, Mr.
4 Lowe continued to refuse to remove the enclosure. The septic plant remains enclosed to
5 this day.

6
7 6. On the 18th January 2018 the Corporation filed an Originating Summons which seeks
8 the following:

- 9
10 i. An Order for demolition of the enclosure and the removal of other plants and articles
11 unlawfully constructed, placed or planted on the Common Property of the Strata;
12 ii. An Order prohibiting construction, placing or landscaping of the Common Property
13 without the express written consent of the Plaintiff's Executive Committee; and
14 iii. Costs on an indemnity basis against the Defendants.

15
16 7. The Defendants acknowledged service on the 8th February 2018, indicating an intention
17 to defend. Mr. Lowe filed a Defence in person on the 5th March 2018 in which he asserts
18 primarily that the construction of the fence (the enclosure) was authorised by the
19 managing director, Ms. Jones but that because she was not contacted when it was
20 constructed, she became angry and said that it should be taken down. He further asserts
21 *inter alia* the following:

- 22 i) When he bought the property, two sides of the fence had already been
23 erected.
24 ii) He wrote to the Plaintiff by letter dated 29th June 2015 as to his findings
25 relative to the property and his intention to beautify it. He says, "*I did not*



1 *hear from her again for several weeks so I went ahead and created border(s)*
2 *around the apt.” This was just temporary.*

3 iii) The cameras were installed as a result of thieves coming on to the property
4 and distributing stolen goods.

5 iv) On the 17th July, 2015, he attended a meeting with some owners, at
6 apartment 10. The owners of apartments 10 and 13 were present. Those
7 present voted in favour of the flower beds and trees that he planted.

8 v) Since the invasion of the thief he erected the other side of the fence.

9 vi) The Plaintiff told him to remove the fence *“to avoid blocking out the*
10 *treatment plant which would make the area look bad and the fence was*
11 *already built and cost him to install now to cut it off would cost him again*
12 *and this is without regard to his financial position and easement”*. He also
13 says:

14 *“During that meeting all owners came to look at the work done and*
15 *asked that I cut off the fence to put it by the brick area. I do not*
16 *agree and refuse to take it down so I think it made the Plaintiff [the*
17 *Plaintiff’s representative] mad and she started a vendetta against*
18 *me.” The Plaintiff spoke to me telling me where to put the fence but*
19 *to call her when I was doing it, I didn’t call her that is why she*
20 *wants the fence torn down to please herself and out of spite.”*

21 vii) He has offered to give the managing director a key and to leave the door
22 open whenever access is needed.

23 viii) He was told by the Real Estate agent when he bought the place that the space
24 at the back of the apartment was theirs.

25 ix) The fence is needed for privacy and security.



1 8. He ends by asking that the Court stay the Plaintiff's suggested order and allow matters
2 to remain as is. He says that the septic plant was in a deplorable state when he moved in,
3 and that having improved the state of it, he should be allowed some easement.

4 **THE HEARING**

5 9. The matter came on for hearing on the 10th July 2019. Mrs. Lowe did not attend. Mr.
6 Lowe advised the Court and Counsel that his wife did not do any of the work, he is the
7 one who did everything and that his wife did not wish to have the embarrassment of
8 attending Court. The Plaintiff's Attorney indicated that he had no objection to
9 proceeding in her absence. The matter therefore proceeded in the absence of the Second
10 Defendant.

11
12 10. At the start of the hearing Mr. Lowe was given permission to file his Affidavit in the
13 matter which he had not previously done. There was no objection to this as his Affidavit
14 is in the same terms as his Defence which was filed on the 5th March 2018. He produced
15 an unsigned Affidavit later in the day prior to giving evidence. He swore to the truth of
16 its contents in the witness box and undertook to swear and file same the following day,
17 which he did.

18 **ISSUE**

19 11. The primary issue between the parties is one of fact as to whether or not Mr. Lowe
20 received permission to fully enclose the area to the rear of his apartment and to plant
21 trees and flowers in the Common Area of the Complex.

22
23 12. The onus is on the Plaintiff to satisfy the Court on a balance of probabilities that he did
24 not have such permission.

25

1 THE STATUTORY PROVISIONS

2 13. The Strata Titles Registration Law provides in section 3 that the proprietor of land upon
3 which a building is to be constructed may apply to the Registrar for a horizontal or
4 vertical subdivision to be known as strata lots in accordance with a plan which is to be
5 known as a strata plan. Where such a plan is registered, strata lots under the plan may be
6 devolved and be dealt with in the same manner as land which falls under the Registered
7 Land Law.

8
9 14. On the 9th October 2012 the Law was amended to include in s.3 the following:-



10 “(2A) Upon registration of a strata plan, complete strata plan, phase strata plan
11 and an amended strata plan-
12 (a) the land described in such plan is divided into strata lots and
13 common property, if any, in accordance with the plan; and
14 (b) the proprietor of each strata lot is entitled to all the rights and
15 obligations of a proprietor including the right to vote as a member
16 of the corporation established upon registration of the plan in
17 accordance with section 5.”

18
19 15. By s.5 (1) of the Law, upon registration of a strata plan, the proprietors of all strata lots
20 contained in such plan, become a body corporate (‘corporation’) under the name, the
21 Proprietors, Strata Plan followed by an assigned number. By s.5(2), every such
22 corporation shall have perpetual succession, a common seal and be capable of suing and
23 being sued in its name.

24
25 16. The duties of a corporation are set out in s.6. These include in subsection (b) to keep in
26 a state of good and serviceable repair and properly maintain the common property and
27 to comply with notices by public or local authorities requiring repairs or work done in

1 respect of the parcel. A corporation may enter any strata lot and effect repairs or carry
2 out work in accordance with its duties.

3
4 17. Part IV of the Law deals with easements in favour of and against any proprietor of a
5 strata lot. The easements against are set out in s.12(b):

- 6
7
8 “b) as against the proprietor thereof and to which it shall be subject-
9 (i) an easement for the subjacent and lateral support of the common
10 property and of every other strata lot capable of enjoying support
11 from such strata lot; and
12 (ii) easements for the passage or provision of water, sewerage,
13 drainage, gas, electricity, garbage, artificially heated or cooled air
14 and other services (including telephone, radio and television
15 services) through or by means of any pipes, wires, cables or ducts
16 for the time being existing within such strata lot, as appurtenant to
17 the common property and to every other strata lot capable of
18 enjoying such easements.”



19
20 18. By s.22, the proprietors may by super majority direct the corporation to execute on their
21 behalf a grant of an easement or a restrictive agreement burdening the parcel or by
22 special resolution direct the acceptance of a grant of the same which benefits the parcel.

23
24 19. Common property is defined in the law as meaning, in relation to any strata plan, so
25 much of the land to which such plan relates as is for the time being not included in any
26 strata lot contained in such plan.

27
28 20. With respect to ownership of common property, s.13 provides as follows:

- 29 “13. (1) The common property shall be held by the members as proprietors
30 in common in shares proportionate to the unit entitlement of their
31 respective strata lots.
32 (2) The Registrar shall, in making out a land certificate for any strata
33 lot, certify therein the proprietor’s share in the common property.



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(3) *Save as is provided in this Law, no share in the common property shall be disposed of except as appurtenant to a strata lot and any assurance of a strata lot shall operate to assure the share of the disposing party in the common property without express reference thereto.*

21. The proprietors may direct the corporation to transfer or lease the common property by way of a duly passed super-majority resolution (section 14).

22. By s.21, the control, management, administration, use and enjoyment of the strata lots and common property shall be regulated by bye-laws. These shall include mandatory bye-laws set out in Schedule 1 to the Law and bye-laws from the corporation itself. Bye-laws which are for the time being in force bind every corporation and the proprietors thereof.

THE BYE-LAWS

23. The mandatory bye-laws in Schedule 1 to the Law include the following duties of a proprietor:

- “1 (d) *use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors or their families or visitors;*
- (e) *not to use his strata lot or permit it to be used in such manner or for such purpose as shall cause a nuisance or hazard to the occupier of any other strata lot (whether a proprietor or not) or any member of the household or any guest of such occupier; “*

24. The powers of the corporation include the power to do all things reasonably necessary for the enforcement of the bye-laws and the control, management and administration of the common property and the following duties:

1 29. The Corporation shall control, manage and administer the Common Property for the
2 benefit of all proprietors and keep in a state of good and serviceable repair and properly
3 maintain the fixtures and fittings used in connection with the Common Property.
4 Additionally the Corporation shall where practicable establish and maintain suitable
5 lawns and gardens on the Common Property.

6
7 30. The keeping of the Common Property and fixtures and fittings is subject to the
8 contribution and payment by the proprietors and includes to maintain all its parts,
9 gardens, shrubberies and entrance drives with the gardens properly planted with shrubs
10 and flowers in due season and free from weeds, clean and tidy and free from all
11 obstruction.

12
13 31. There is an express provision that nothing contained therein shall prejudice the
14 Corporation's right to recover from a proprietor the amount or value of any loss or
15 damage suffered by or caused to the Corporation or the Common Property by the
16 negligence or wrongful act or default of the proprietor of any Strata Lot or such other
17 person. (Paragraph 34(8)).

18
19 32. By paragraph 35(6) the Corporation may do all things reasonably necessary for the
20 enforcement of the bye-laws and the control, management and administration of the
21 Common Property.

22
23 33. The obligations of a proprietor are set out in paragraph 33 of the bye-laws and include
24 the following, to:

25 “(5) *use and enjoy the Common Property in such manner so as not to*
26 *unreasonably interfere with the use and enjoyment thereof by other*
27 *proprietors or their families or visitors;*

- 1 (11) not make any alterations or additions in or to the Strata Lot without the
2 approval in writing of the Corporation to the plans and specifications
3 thereof and make such alterations only in accordance with such plans and
4 specification when approved;
- 5 (14) permit the Corporation and the proprietors of other Strata Lots to have
6 access to and enter upon the Strata Lot as often as may be reasonably
7 necessary for them to do so in the fulfilment of their obligations relating to
8 the Common Property and to other Strata Lots;
- 9 (17) comply with and observe any reasonable regulations which the Executive
10 Committee may from time to time make to govern the use of the Strata Lots
11 and the Common Property, which regulations may be restrictive of acts
12 done on the Strata Lot or on the Common Property which is in the opinion
13 of the Executive Committee are or likely to be detrimental to the character
14 or amenities of the Apartments;
- 15 (21) not, without the previous consent of the Executive Committee cause or
16 permit anything to be placed on the outside walls of the Strata Lot and in
17 particular, but without limiting the generality of the foregoing, not without
18 such consent to cause or permit any sign,to be affixed to or placed
19 upon the exterior walls or roof or any part of the Strata Lot;
- 20 (30) not alter or construct in or remove from the Common Property anything
21 except with the written consent of the Executive Committee.”
22

23 **THE EVIDENCE**

24 **Evidence of Lavinia Jones**



- 25
- 26 34. The Plaintiff's Summons is supported by the Affidavit of Ms. Lavinia Jones dated 3rd
27 November 2017. She is authorised by the Plaintiff to make the application on its behalf.
- 28
- 29 35. Ms. Jones states that in or around 2015, the Defendants constructed or caused to be
30 constructed a fence which encloses the septic tank on the Complex. This fence with
31 doors is entirely outside the aesthetic development and encloses a part of the Common
32 Property as defined in the bye –laws. She asserts that this is in breach of the bye-laws
33 sections 33, (5), (11), (14), (21) and (30) and has also caused the Plaintiff to risk
34 breaching its obligations under section 34 of the bye-laws.
35

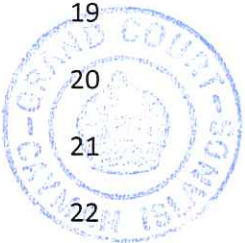
1 36. She states further that in 2017 the Defendants placed various sizes of cement blocks and
2 brick pavers of various colors around various plants without permission. The Strata has
3 asked Mr. Lowe to remove the fence by letters from its Attorneys. Mr. Lowe has replied
4 refusing to do so.

5
6 37. She gave oral evidence that the septic tank which is an area beyond Mr. Lowe's patio is
7 the main concern. The Corporation has to service it twice a year and has had problems
8 in the past for the Water Authority to access it. The Water Authority sought access to
9 the septic system for testing purposes, and she was not able to grant such access.

10
11 38. She said that it was true that Mr. Lowe had asked for permission to enclose the area but
12 he did not obtain it. Her response to him when he handed in the letter seeking permission
13 was that the Strata would have to call an extraordinary meeting. She said that it was
14 absolutely false that she had said in front of two proprietors that she knew and had read
15 up about him.

16
17 39. At a later meeting in March 2016 they had tried to have a peaceful resolution. The
18 decision made by the Strata was that some of the landscaping may remain provided that
19 Mr. Lowe agrees that it is Strata property and that the Strata has the right to bring the
20 work up to standard. They had also agreed that his security cameras could remain and
21 that the flower beds could remain – provided ownership was handed over to the Strata.
22 The trees planted on the Common Property, including a plum tree and one coconut tree
23 could remain, provided they are handed over to the Strata and the Strata has the right to
24 remove what it wishes.

25
26 40. The Proprietors had looked at the treatment plant during the meeting and said that the
27 fencing should be removed immediately and Mr. Lowe refused to do this.



1 41. She gave evidence that the Strata Plan allows everyone to have a patio which patio can
2 be enclosed. Everyone else has enclosed property that they lawfully own, Mr. Lowe has
3 enclosed the septic tank for the Complex which is on a strip of land which is Common
4 Property. No one else has done that.

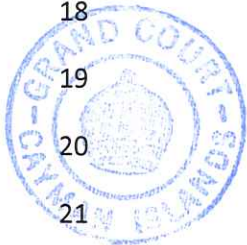
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6 42. The septic tank had not previously been enclosed. There had been a border between Mr.
7 Lowe's property and the property of a neighbor, Gary and there was a short side at the
8 end of the property, which Mr. Lowe has extended. That area did not have a side wall at
9 the time. The entire area was open when Mr. Lowe took possession. Prior to then, at no
10 time had she had to ask permission from an owner in order to access the tank. Mr. Lowe
11 had to enclose two sides in order to enclose the septic tank.

12
13 43. She said that no one was disputing Mr. Lowe's reasons for privacy and security. They
14 respect whatever reasons he has but the concern is that he has enclosed Common
15 Property.

16
17 44. Mr. Lowe suggested to her that she had given him permission to move a barbecue grill
18 because it is not Common Property. She agreed that he had asked about the grill which
19 was outside his apartment. The grill had been there a long time ago before he came. She
20 gave him permission to move it. She did not give him permission to move the grill so
21 that he could build the fence. Neither did she tell him that he could build the fence in
22 line with the utility room.

23
24 45. She denied giving him permission to enclose the sewage plant (septic tank) and said that
25 the only thing she had ever said to him is that he could enclose his patio like anyone else.

26
27 46. At this point Mr. Lowe suggested to her that:

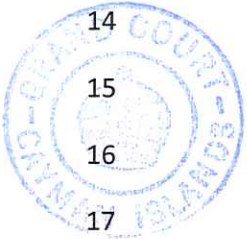


1 “I said to you if I put it behind here it would not look good, I said to you if it is put
2 in line with the utility room, it would be better, uniformity.”

3 Ms. Jones said that the area he is referring to aligns with his patio. She told him that he
4 has permission to enclose the patio. Instead he has gone beyond that and has enclosed
5 Common Property.

6 47. She said that there are five proprietors who do not like what Mr. Lowe has done. They
7 do not have any problem with plants provided that he agrees that the Strata takes them
8 over. They will have a meeting and will do their best to keep the banana trees. Some of
9 the trees are beautiful. They will improve upon what he has done. He failed to get
10 permission from the Strata to do it.

11
12 48. She also gave evidence that the Executive Committee should have not less than five
13 persons and not more than eight. The decision to take Mr. Lowe to Court was voted for
14 at the annual general meeting. There were four owners present at the meeting, Gary,
15 Lana, David Mitchell and Mr. Lowe was present as well. One party was in arrears,
16 Cedric, so he would have had no voting rights. The decision was thus made by the
17 majority and was also supported by a written resolutions for the management firm to
18 institute proceedings against Mr. Lowe.



19 **The Evidence of Mr. Lowe**

20 49. There is no issue as to whether or not the property fully enclosed by Mr. Lowe is
21 Common Property. In cross examination he said that initially he did not know that it was
22 but he now accepts that it is.

23

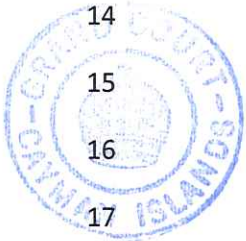
1 50. He said that he did not build anything, he just added to what was there. He accepted that
2 he does not have the right to add to fixtures on Common Property.

3
4 51. In his Affidavit and oral evidence, he put forward various explanations for erecting the
5 enclosure. These include that it was needed for privacy and security. He said that
6 following the sighting of a thief outside, the fence needed to be completed for security
7 reasons. His wife is at home mostly by herself and he needs to protect his property and
8 the contents.

9
10 52. He also said that before moving in, the real estate agent had shown him the back line and
11 told them that the property was theirs.

12
13 53. He complained that on moving in there was nobody to ask any questions, that he did not
14 have a copy of the bye-laws. He had requested them from Ms. Jones at his first meeting
15 with her on the 29th June 2015 as well as the contact details for other owners. He said
16 that Ms. Jones had refused to provide them. He said that he was not aware that he could
17 obtain a copy of the bye –laws from the Land Registry.

18
19 54. In response to his cross examination on this aspect, Ms. Jones explained that at closing
20 of the sale of a property, the management company must present bye -laws and minutes
21 of the annual general meetings. That is the procedure for every new owner. This is
22 required by law. The management company would have done the same for Mr. Lowe’s
23 closing. However the company is not retained to visit every new owner and hold
24 conversations with them. There are no personal conversations with new owners neither
25 is it the procedure to write to new owners and give guidelines. The management
26 company does this through the provision of minutes of meetings and bye- laws. These
27 are provided to the attorneys acting on the sale and transfer of the property.



1 55. Mr. Lowe alleged that on their first meeting Ms. Jones said to him that she had read up
2 about him and that she must have a grudge or vendetta against him. He referred to his
3 nationality as a Jamaican and to the nationality of the other proprietors as being a
4 possible reason why those persons might also have a vendetta against him. Ms. Jones in
5 response to these suggestions denied any such grudge or vendetta. She said that she met
6 him for the first time in June 2015.

7
8 56. Mr. Lowe stated that he is a former manager of a strata complex at Randyke Gardens in
9 George Town which was well run so that he is aware of how a strata operates.

10
11 57. His primary assertion is that he requested permission to erect the fence enclosure and
12 that he was given verbal permission, once by the Plaintiff in the person of Ms. Jones and
13 secondly at a meeting of the Proprietors in March 2016. He says that essentially it is the
14 word of Ms. Jones against his because neither party called any additional witnesses.

15
16 58. In his Affidavit and oral evidence, Mr. Lowe stated that he had given the Plaintiff a letter
17 dated 29th June 2015.

18
19 59. In my assessment of this matter and of the credibility of each party, the letter of 29th June
20 2015 is important. It is headed "*Re Moving In and Problems.*" This is what it says:

21 *"We would like to inform the Strata of our moving in on the 13th June 2015*
22 *officially and is in a position now to discuss a way forward. We would like*
23 *permission to erect a continuation of rear fence around the property like the rest*
24 *and erect a flower garden around our side of the building with bricks and at the*
25 *front steps."*



1 60. From this letter it is clear to me that Mr. Lowe knew that he required permission to
2 enclose the rear of the property and to plant a flower garden.

3

4 61. What then was the response to his request?

5

6 62. Ms. Jones said that having been handed the letter, she needed to call a general meeting
7 in order for a response to be obtained from the other proprietors and that there is a
8 specific notice period of 21 days in the bye-laws.

9

10 63. In his defence and in his Affidavit, Mr. Lowe said that he did not hear back from her for
11 a period of several weeks so he went ahead and created a border around his apartment.

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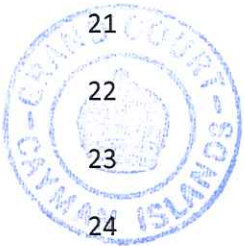
13 64. In his oral evidence before the Court he said that she did not get back to them. He
14 explained that he had family members who were coming to visit from overseas, some of
15 whom had helped him to purchase the property. Six of them came down to look at the
16 property. He said that he had tried to make the place attractive when they came. He was
17 so excited to get the place so he *“quickly erected the side flower bed and started planting*
18 *up.”*

19

20 65. As to the fence he was adamant that two sides were already there when he moved in
21 having been left there by the previous owner and that he only put up one side. Ultimately
22 Ms. Jones did not disagree with this although she said it was part of one side and another
23 side. Both agree that the fence was already partially there. Mr. Lowe agrees that his
24 actions enclosed the area completely.

25

26 66. Finally in his evidence, Mr. Lowe complained that as he had been given verbal
27 authorisation in the presence of two or three witnesses “it must be law” and that it is not



1 fair. He says that he wants to protect his place. He said that he wants a compromise. Ms.
2 Jones could take a key from him, the treatment plant is not “troubling anybody” and
3 could stay as is. It does not cost anything to allow it to remain. They could get a key or
4 he could remove the doors and leave it open so that they could have access. If the place
5 is exposed it would be a security issue.

6
7 67. He also said that what he has done was not done maliciously to hurt anyone. He bought
8 the place and cannot enjoy it. He says that it is a plot against him and asks does he not
9 get an easement? The other option which he suggests is that the Strata charges him
10 money to rent the treatment plant. He says that all he has done is to help to improve the
11 value of the Strata. He said that when he was written to in 2017, he did not demolish the
12 fence because he thinks that he has an easement and he does not think it is right for him
13 to demolish it.

14
15 68. He said that he has verbal permission from the owners who were present at the meeting
16 in March 2016 but that they are the persons who are bringing the case against him so
17 how could he get statements from them. He believes that in fairness to him the Strata
18 could have settled the matter by charging him for the piece of land which he utilised.

19
20 69. Finally he said that the treatment plant was in a deplorable condition and the two palm
21 trees in that area were disturbing him, so he believes in fairness the Corporation could
22 have given it to him. He said that that they chose to put it behind his apartment rather
23 than in the common area and no one else has to bear the scent all day long.



1 **THE SUBMISSIONS**

2 70. In closing submissions Mr. Lowe asked for the Court’s leniency and pleaded that the
3 ackee and plum trees should stay, he has already reaped a crop of ackees and the ackee
4 tree is now bearing fruit. This along with the breadfruit tree is for survival. He said that
5 the coconut tree can go because he can always get coconuts from the nearby church yard.
6 He said that he had tried to utilize the little space that he had and he did not know that it
7 would cause such a problem.

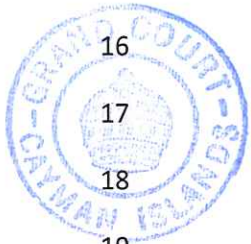
8
9 71. Counsel on behalf of the Plaintiff submitted that there is no scope for projects in the
10 common areas of the Strata and that proprietors are confined in terms of individual
11 management and responsibility of their own respective lots by the provisions of the bye-
12 laws.

13 **ASSESSMENT**

14 72. On Mr. Lowe’s account, the catalyst for his fencing activity was the viewing of a
15 recording made by his security camera which showed a man sitting on the boards outside
16 the apartment apparently distributing money. He said that, he said to himself that he had
17 to fix up the place quickly. In doing the enclosure he felt that if he left out the treatment
18 plant “it would not look so good.” He spoke of a conversation with Ms. Jones who he
19 said was on the property at the time in which she told him in the presence of his wife
20 that he could complete the enclosure. Ms. Jones denies this conversation.

21
22 73. I noted that in saying this, Mr. Lowe recounts a disagreement with Ms. Jones about
23 where the line of the fence should go. This is his evidence:

24



1 *“She said I must pull it in front of me in line with my patio but it would cut off the*
2 *bricks that the gentlemen fix on his place.*

3 *I said why not allow me to put it in line with the utility room. She said for a peaceful*
4 *life she would make it stay like that.*

5 *But she still insist that I must cut off the treatment plant. I said how that it is going*
6 *to look.*

7 *It would still encourage thief. Because he can jump the fence and come into my*
8 *yard.”*

9
10 74. His evidence suggested that there was a disagreement as to where he was to put the fence
11 and that he was the one insisting that he needed to put it in a particular place because it
12 would not look good otherwise.

13
14 75. When he says that he received no response to his letter of 29th June 2015, it is my view
15 that this cannot be a truthful account. Ms. Jones’ evidence is that the extraordinary
16 meeting at which his letter was discussed was held on the 18th July 2015 and he was
17 present. Two other owners were present and she held proxies for two others. She
18 produced minutes which purport to bear the signatures of other owners. The minutes
19 record a decision as to re-staining the doors and that Mr. Lowe was to submit details of
20 the stain which he used. They also record violations of bye- laws by the installation of
21 cameras and of plants by Mr. Lowe and state that these are to be removed from the
22 Common Property. Further that the pavers at his front door would be inspected.

23
24 76. Under the heading Extensions of Patios the minutes record:-



1 79. He then referred in the letter to the unsightly septic tank at the back and suggested that
2 if the trees are to be removed, they could be placed out in the common areas next to the
3 other side or strategically around the property.

4
5 80. This is his evidence as to how the fence came to be enclosed:

6 *"I have pictures of man sitting on the boards distributing money that he stole*
7 *I look into the man's bag, bag was there on the board. We have the police report*
8 *and they came and took the bag and took it to the station.*
9 *So I said boy, I am got to fix up this place here quickly.*
10 *I said if I leave out the treatment plant would not look so good*
11 *Phase 1 was throwing out doors and I use those two doors that you see.*
12 *I paint up the place. Created two keys.*
13 *When they complain I ask if I could give her a key so she could have access to the*
14 *place and they refuse.*
15 *Whenever they want to do things, she send me an email and I must leave place open,*
16 *I check on it myself and they come and draw the stuff.*
17 *I am only saying that on the 20th March where in the meeting, myself, Gary, Lana*
18 *and herself at his apt next door to me, they verbally authorise me planting the plants*
19 *and leaving the camera with a view of compromising, they said I still have to cut off*
20 *the treatment plant.*
21 *Because I refused to cut off the treatment plant, they never gave me anything in*
22 *writing."*



23
24 81. Overall I prefer the version of events as outlined by Ms. Jones. I accept the evidence of
25 Ms. Jones who I found to be a credible and honest witness. I did so, not only based on
26 my impression of her as she gave her evidence but more significantly because her

1 evidence was in my view supported in material particulars by the evidence of Mr. Lowe
2 himself. The evidence in support of Ms. Jones's version of events overwhelmingly
3 comes from Mr. Lowe's own evidence.
4

5 82. I prefer the evidence of Ms. Jones that he was refused permission at this meeting of the
6 18th July 2015. Firstly she produces the minutes which support her account. These
7 minutes were not initially produced as part of the documents in the case but at the end
8 of her evidence in answer to the question, as to whether he was given a response to his
9 29th June 2015 letter.

10
11 83. Secondly any concern as to the possible manufacturing of these minutes was dispelled.
12 Mr. Lowe asserts that he was present at the meeting and the tenor of his own letter of the
13 20th July 2015, makes it very clear that he met with a negative response at that meeting
14 and was seeking the support of the owners against the management. He offered himself
15 in the closing paragraph of that letter as "new blood" and as having ideas for the Strata.
16 Indeed his letter of 20th July 2015 is inconsistent with receiving the permission which he
17 says he received.

18
19 84. As to the second occasion on which he says he received permission, this was at the
20 meeting on the 19th March 2016. On his own account in oral evidence, he said that they
21 gave him permission to keep the plants but took it back when he refused to "*cut off the*
22 *treatment plant.*" He also says that because he refused to do so that they did not give
23 him permission in writing.
24

25 85. This very much supports Ms. Jones' account that the Strata was willing to compromise
26 on the plants and presented him with the option that the Strata would take over and



1 manage the plants and flowers but required him to remove the fence enclosing the septic
2 treatment plant. She also produced the minutes for this meeting as well.

3
4 86. Moreover Mr. Lowe accepts in his Affidavit and oral evidence that he had not received
5 a response prior to the arrival of his visiting relatives and because of the imminence of
6 their visit proceeded to beautify the place. As to the oral permission which he says he
7 received in the course of a discussion about moving the barbecue grill which discussion
8 Ms. Jones says related only to the enclosing of his patio area, on his own account, he
9 says that he was the one insisting to her that placing the fence along the line that she was
10 indicating “would not look good”.

11
12 87. It appears to me that he went ahead and placed the fence where he thought it should be
13 placed. How he could have thought that the septic tank which serves all six units could
14 be anything other than Common Property and that it should be completely enclosed by
15 him is surprising. To make matters worse, he proceeded to attach doors to the fencing
16 and to lock those doors. The photographs which he produced show red bricks which
17 make up his patio area, an area beyond that with the treatment plant and a further strip
18 of land all of which he has enclosed.

19
20 88. That he appreciates the import of his actions is plain from his suggested compromise
21 solutions including that the Strata could rent him the area or grant him an easement.

22
23 89. I do not accept his evidence when he says that he received permission. His own account
24 is inherently inconsistent in recounting when and how and the nature of the permission
25 which he says he received.
26



1 90. Mr. Lowe alleges that Ms. Jones and other proprietors have a vendetta against him and
2 that the refusal of the Strata to grant him written permission flows from this.

3
4 91. He says that except for one proprietor who recently purchased property from Mr.
5 Mitchell, none of the other proprietors speak to him even though they used to do so.

6
7 92. Having listened to and observed Ms. Jones, his allegation of a vendetta is one I reject. I
8 believe her evidence that she has nothing personal against him and that she did not claim
9 to have read up about him or to have said that she “earns the big bucks to make the
10 decisions”. I have not seen any evidence to support such an allegation. Ms. Jones states
11 that the other owners are upset about what Mr. Lowe has done on the property. This
12 action has been brought because the proprietors (by a majority) are not in favour of his
13 actions.

14
15 93. The issues which they raise are reasonable ones and they appear to have a legitimate
16 concern that the Strata’s access to Common Property is restricted in the way it has. I am
17 satisfied that the response to his actions is not because of a personal vendetta or grudge
18 or malice against him but because there is good reason for concern.

19
20 94. He raised other issues which are not central to the case. For example he complained that
21 the Strata refused to extend the parking lot, and about having to sell his very large truck
22 which was too big for that parking lot. He also said that his strata fees are not current
23 because he has had some difficulties. None of this leads me to conclude that there is
24 some vendetta against him.

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1 **LEGAL ISSUES**

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95. There is no suggestion that the bye-laws of the Corporation are ultra vires or inconsistent with any legal provisions.
96. An examination of the bye- laws which are material to this application as to the use and management of Common Property shows that for the most part these are replicated in the mandatory bye-laws in Schedule 1 to the Law.
97. The restrictive agreements as listed in the bye-laws were properly registered in the encumbrances section of the Land Register as is required by section 93 of the *Registered Land Law (2004 Revision)*.¹ The Register records the registration of them on the 12th January 1990 as Entry no. 3. Section 93 provides as follows

- “(1) *Where an instrument, other than a lease or charge, contains an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the incumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering particulars of the agreement or by referring to the instrument containing the agreement, and shall file the instrument.*
- (2) *Unless it is noted in the register a restrictive agreement is not binding on the proprietor of the land or lease burdened by it or on anybody acquiring the land or lease.*
- (3) *The note of a restrictive agreement in the register does not give the restrictive agreement any greater force or validity that it would have had if it had not been registrable under this Law and had not been noted.*
- (4) *Insofar as the restrictive agreement is capable of taking effect, not only the proprietors themselves but also their respective successors in title shall be entitled to the benefit and subject to the burden of it respectively, unless the instrument otherwise provides.*



¹ The 2004 Revision was in force at the time of purchase of the property.

1 98. The fact of the proper registration of the bye-laws means that they are binding on all the
2 Proprietors of Strata Plan 126 and thus on Mr. Lowe.²

3
4 99. The single legal issue raised by Mr. Lowe is that he has an easement because he is an
5 owner. Firstly, the bye- laws, clearly set out his rights as an owner with respect to the
6 common areas of the property. Nothing in these bye-laws confers on or grants to him the
7 right to acquire sole use of Common Property.

8
9 100. Easements are defined in the *Registered Land Law (2018 Revision)* as meaning a right
10 attached to a parcel of land which allows the proprietor of the parcel. either to use the
11 land of another in a particular manner or to restrict its use to a particular extent, but does
12 not include a profit which is dealt with separately.

13
14 101. Section 92 of that Law provides that the proprietor of land or a lease may, by an
15 instrument in the prescribed form, grant an easement over his land or the land comprised
16 in his lease, to the proprietor or lessee of other land for the benefit of that other land.
17 Additionally any proprietor transferring or leasing land or a lease may in the transfer or
18 lease grant an easement, for the benefit of the land transferred or leased, over land
19 retained by him, or reserve an easement for the benefit of land retained by him. These
20 provisions are the same as in the earlier versions of the Law.

21
22 102. There is no evidence in this case of an express grant of any easement to Mr. Lowe or of
23 any such grant which was devolved to him on transfer of the Land which would allow
24 him to act in the way he has done.

25

² Forth v. Strata Plan No. 436 2015 (1) CILR 436



1 103. With respect to any grant of an easement by implication, I have considered whether there
2 is sufficient evidence to be able to conclude that an easement of necessity might arise.
3 This would most commonly arise where, on the transfer of land, but for the easement
4 which is sought, a proprietor would be unable to access his property. Secondly where
5 there might be an implied easement to give effect to the intended use of a property. One
6 example is in the case of *Wong v. Beaumont Property Trust Ltd*³ where the tenant was
7 held to have an easement of necessity. I have also considered the rule in *Wheeldon v.*
8 *Burrows*⁴. In respect of the latter consideration there is no evidence that any easement
9 exists which was continuous and apparent, or necessary for the reasonable enjoyment of
10 Mr. Lowe's property or that one had been previously granted.

11
12 104. In *Megarry & Wade, The Law of Real Property 8th edition* at paragraph 27-0004 it states
13 that there are four requirements before there can be an easement. These are:

- 14 i. The existence of a dominant and servient tenement;
- 15 ii. That the easement must confer a benefit or accommodate the dominant tenement.
16 Under this heading the servient tenement should be close enough to the dominant
17 tenement in order to be able to confer a practical benefit to it;
- 18 iii. The two tenements must be owned and occupied by different persons; and
- 19 iv. The easement must be capable of forming the subject matter of the grant.
20

21
22 105. It is in respect of the fourth requirement that there may be the most difficulty for Mr.
23 Lowe. What he is seeking is not a right to use part of the common areas but an exclusive
24 right to use the area enclosed. The general principle is that an easement must not be a

³ [1965] 1 Q.B. 173
⁴ [1879] 12 Ch. D.31

1 right which is too extensive. An easement as distinct from a licence would not ordinarily
2 provide for a right to occupy land (See the case of *Att. Gen of Southern Nigeria v. John*
3 *Holt & Co. (Liverpool) Ltd.*⁵)
4

5 106. In *Reilly v. Booth*⁶, Lopes L.J. stated:

6 *“The exclusive or unrestricted use of a piece of land, I take it, beyond all question*
7 *passes the property or ownership in that land, and there is no easement known to*
8 *law which gives exclusive and unrestricted use of a piece of land. It is not an*
9 *easement in such a case, it is property that passes.”*
10

11 107. In *Copeland v. Greenhalf*⁷, the defendant claimed the right of an easement to place and
12 leave vehicles on a strip of land belonging to the plaintiff. He claimed that he and his
13 father before him had been using the land for some 50 years to store vehicles for his
14 wheelwright business. The Court held that the right exercised and claimed was too
15 extensive to amount to an easement in law, as it amounted practically to a claim for the
16 whole of the beneficial use of the strip of land. Upjohn J. stated:

17 *“The occupier of a dominant tenement over a servient tenement. This claim (to*
18 *which no closely related authority has been referred to me) really amounts to a claim*
19 *to a joint user of the land by the defendant. Practically, the defendant is claiming*
20 *the whole beneficial user of the strip of land on the south-east side of the track there;*
21 *he can leave as many or as few lorries there as he likes for as long as he likes; he*
22 *may enter on it by himself, his servants and agents to do repair work thereon. In my*
23 *judgment, that is not a claim which can be established as an easement. It is virtually*
24 *a claim to possession of the servient tenement, if necessary to the exclusion of the*
25 *owner; or, at any rate, to a joint user, and no authority has been cited to me which*
26 *would justify the conclusion that a right of this wide and undefined nature can be*
27 *the proper subject-matter of an easement.”*
28

29 108. I conclude against the background of the general principles, the absence of evidence
30 establishing an easement and the extensive rights which Mr. Lowe seeks, which would

⁵ [1915] A.C.599

⁶ [1890] 44 Ch. D.12

⁷ [1952]Ch. 488

1 not ordinarily be granted in an easement, that Mr. Lowe has not acquired an express or
2 implied easement over the area of Common Property which he has enclosed.

3
4 109. Mr. Lowe also appears to raise the issue of the reasonableness of his actions. In the case
5 of *In Re Cayman Kai Development Scheme*⁸ the plaintiff association sought inter alia
6 an injunction preventing the second defendant from operating a real estate office in
7 breach of a restrictive covenant which limited the use of the property for other than
8 residential purposes. In consideration was whether the non-residential use of the
9 property to wit for the purpose of a real estate operation was a reasonable one. The
10 defendants submitted that they had been operating the same real estate business for some
11 30 years, albeit on a smaller scale and that the plaintiff had not objected and thus that
12 they should now be barred from seeking relief. Sanderson J, held that the proposed re-
13 zoning of the property and its becoming a full time real estate agency with parking for
14 six cars and no person living in the house was a fundamentally different situation from
15 the smaller scale activities carried on in previous years.

16
17 110. In this case Mr. Lowe, prays in aid that a portion of the fence was already there and that
18 he enclosed, on his account, only one side. This cannot avail him. There is a marked
19 difference between a complete enclosure which is locked and a partially open one to
20 which the Strata would have had immediate access.

21
22 111. Secondly Mr. Lowe prays in aid the effect of what he has done, he says that the place is
23 now more beautiful, he says that he himself cleaned the septic plant area, by going down
24 on his knees and covering it with cement rather than with the crushed stone that was

⁸ [2006] CILR 117,

1 there. He says that he was the one that had to bear the scent. None of this excuses his
2 enclosure actions.

3
4 112. I have considered whether his actions in completing the enclosure can be viewed in any
5 light as a reasonable response to the conditions which he details at length or to his
6 expending resources on it. I am not persuaded that it can. In any event it strikes me, that
7 the reasonable option would have been to erect the enclosure to block out rather than
8 include the septic plant as part of his own property.

9
10 113. Even if he says that it was for security reasons that he enclosed it and that this must be a
11 reasonable use, I note the reasoning of Sanderson J in the cited case. The Learned Judge
12 in that case said this:

13 *“27 The defendant next argues that the use of its property is “reasonable” and*
14 *therefore it should not be enjoined from such use. First, I do not accept that*
15 *a real estate office is a reasonable use in the circumstances of this case. I*
16 *have already described the nature of the change in respect of the use and*
17 *operation of the premises. It is not necessarily reasonable to allow a*
18 *business office, with the attendant increase in traffic from staff and clients,*
19 *in a residential neighbourhood. Secondly, no authority was cited indicating*
20 *that if a use is reasonable then it may be carried on in breach of a restrictive*
21 *covenant.”*
22

23 114. I respectfully adopt the reasoning of the Learned Judge. Thus while I cannot regard Mr.
24 Lowe’s actions as a reasonable use, even if they were, this would still not justify his
25 breach of the bye-laws. Further the fact that he has expended money and resources does
26 not justify or excuse his actions or serve to grant him some sort of easement.



1 CONCLUSION

2 115. I have considered and taken into account all of the evidence given and submissions made
3 in this case. I have not recorded some of the evidence and submissions in this judgment.
4 I am satisfied on balance that the Plaintiff has established its case against Mr. Lowe, that
5 he did not obtain permission for his fencing and planting activities on the Common
6 Property of the Strata as is required by the bye- laws. Based on my factual findings, I
7 declare that Mr. Lowe is in breach of the bye- laws of Strata Plan 126.

8
9 116. It is not appropriate for him to block access to Common Property and even more so
10 where that property includes the sewage treatment plant to the Complex which may
11 require emergency access.

12
13 117. Mr. Lowe asked the Court to intervene and consider an easement or rental or lease of the
14 area enclosed. The option of rental or grant of an easement is not one for the Court.
15 Under the Law, this is a matter for the Strata Corporation if they wish to do so.

16
17 118. I conclude by making declarations and orders as follows:

18 i. The First Defendant, Daniel Lowe erected fencing walls (enclosures) to the rear of
19 the property without the permission of the Strata Corporation and is therefore in
20 breach of the bye-laws of the Corporation;

21
22 ii. The Plaintiff's request for an order for demolition of the fence to the rear of the
23 property is granted to the extent that the First Defendant Daniel Lowe is required to
24 demolish that part of the fence which he erected;

25



1 iii. The First Defendant, Daniel Lowe planted flowers and trees on the Common
2 Property of the Strata Corporation without permission of the Corporation and is in
3 breach of its bye-laws;

4
5 iv. The plants and trees on the Common Property are to be managed by the Strata
6 Corporation in accordance with the bye-laws of the Corporation. Such management
7 may include removal of such trees and plants and removal and replacement of any
8 borders surrounding such trees and plants;

9 v. The First Defendant Daniel Lowe is prohibited from constructing, placing or
10 landscaping the Common Property of the Strata without the express written consent
11 of the Plaintiff's Executive Committee as is required by the bye-laws of the Strata
12 Corporation.

13 **COSTS**

14 119. On the issue of costs, the Plaintiff seeks costs on an indemnity basis. It was submitted
15 that the First Defendant had been asked repeatedly to remove the structure and that even
16 after the Court process started had the opportunity to do so. I do not think that indemnity
17 costs are appropriate in a case such as this. In the case of *Bennett v. Attorney General*⁹,
18 Henderson J. discussed the difference between maintaining a defence which is merely
19 weak and unlikely to succeed and maintaining one which is manifestly hopeless. The
20 Learned Judge said that advancing a case which is merely weak or unlikely to succeed,
21 may not be unreasonable in the typical case. Weak cases would succeed from time to
22 time and a litigant may prefer to have a judicial determination on a matter rather than
23 accept the advice of his attorneys. Henderson J then stated:

⁹ [2010 (1) CILR 478

1 *“There are also cases which are hopeless and which appear that way to*
2 *anyone with the requisite legal training. It is open to a judge to determine that it was*
3 *unreasonable to bring such a claim or advance such a defence. The usual result of such*
4 *a finding is that the unsuccessful party will pay costs on an indemnity basis.”*

5
6
7
8 120. In this case where the Defendant appeared in person and was not advised by Counsel. I
9 do not consider that indemnity costs are appropriate. Costs are ordered in favour of the
10 Plaintiff, on the standard basis.

11
12 **Dated this the 2nd day of August 2019**

13 



14 **Honourable Justice Cheryll Richards Q.C.**
15 **Judge of the Grand Court**