

**Adrienne v Pillay  
(2003) SLR 68**

Charles LUCAS for the Plaintiff  
Philippe BOULLE for the Defendant

**Ruling delivered on 5 November 2003 by:**

**PERERA J:** The Plaintiff's claim is based on the alleged right of superficies in the alternative a claim for a sum of Rs.350,000 being the value of the structures and improvements erected on the Defendant's property. The objection arises from an objection raised by Mr Boulle, Learned Counsel for the Plaintiff, in the course of his evidence, sought to testify regarding the consent given by a previous co-owner to occupy the land, and to construct buildings thereon. It was submitted that such matters being "fait juridique", no oral evidence is admissible in the absence of a writing, as required by Article 1341 of the Civil Code.

Mr Lucas, Learned Counsel for the Plaintiff contended that the consent which the Plaintiff seeks to testify about, was given by one of the co-owners before the land was subdivided and sold to the Defendant. He submitted that the consent of a third party to such agreement could not raise the objection. For the Plaintiff was seeking to establish the consent constructively from the circumstances in which he came to the land and built the buildings thereon. He submitted documentary evidence in proof of his expenses incurred in the construction of the buildings that there was no written proof of the consent to build.

Article 1341 of the Civil Code provides that "any matter" the value of which exceeds Rs.5,000 would require a writing, and that no oral evidence shall be admissible in respect of such document or in respect of what is alleged to have been said or done at the time when such document was drawn up. It is settled, that such matters being "fait juridique"; a distinction must be drawn between juridical acts (fait juridique) and mere acts (fait materiel). Juridical acts involve the manifestation of the will of that person, and hence the person relying on it must produce documentary evidence that to such consented, agreed or that permission was granted would involve the will of that person, and hence the person relying on it must produce documentary evidence. Mr A. Sauzier states in his booklet on *Evidence* that :

The fact of building without hindrance may be proved by oral evidence but the giving of permission to build must be proved by documentary evidence if oral evidence is objected to. One cannot presume the mere fact of building without hindrance.

The Seychelles Court of Appeal, in the case of *De Silva v Bacc* expressed a similar view and stated inter alia that:

of which exceeds the value of the plants, the instant ruling is in favour of the Defendant when the Defendant sought to testify regarding an alleged consent to occupy the land and to construct buildings thereon. It was submitted that such matters being "fait juridique", no oral evidence is admissible in the absence of a writing, as required by Article 1341 of the Civil Code.

consent or agreement before the parent or guardian of the Defendant being a minor; he submitted that the Plaintiff was seeking to establish the consent constructively from the circumstances in which he came to the land and built the buildings thereon. He submitted documentary evidence in proof of his expenses incurred in the construction of the buildings that there was no written proof of the consent to build.

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such consent would amount to a "fait juridique" which normally would have had to be proved in accordance with the provisions of Article 1341 et seq of the Code.

However Lalouette J A was of the view that an agreement to build need not be witnessed by a written document, although, if no document exists, difficulty may arise to prove the existence of the right by oral testimony. He further stated that a "*droit de superficie*" is a real right severed from the right of ownership of land and, conferred on a party, other than the owner of the land, to enjoy and dispose of the things rising above the surface of the land, such as constructions, plantation and works.

In an editorial note in the case of *DeSilva* (supra) it is stated that it is a moot point whether a "droit de superficie" may be claimed in respect of land on the land register, as the land Registration Act does not make provision for such an interest in land. It is my view however that a "droit de superficie" would be "an overriding interest" as envisaged in Section 25 of the Land Registration Act (Cap 107) where a person is in possession or actual occupation of the land.

Admittedly, in the present case, the land in dispute is on the old land register and hence Section 25 does not apply. However notionally, such interest subsists for material purposes.

Mr Lucas submitted that even if permission to build cannot be proved by oral evidence, the Defendant is bound by the rights of the Plaintiff pursuant to the purchase of the land in July 2002. It was submitted that the Defendant inherited rights and liabilities of "the predecessor in title who had permitted the Plaintiff to build on the land, which fact was known to the predecessor in title of the Defendants. Oral evidence of the fact of building without hindrance would be admissible. A "droit de superficie" can be established only where a person builds on a land belonging to a third party without consent. Such consent can be proved by a document.

The initial issue to be decided in this ruling is whether the Defendants who purchased from a co-owner of the land, and thereby is a third party to any consent or agreement allegedly given by another co-owner, has the right to raise an objection under Article 1341 of the Civil Code, as is being done now.

It was contended by Mr Boule that the Defendant is not a third party in the sense that she has inherited the rights and liabilities of the previous owner and hence would be entitled to raise all defences available to that owner. The weight of authority however is to the contrary.

In *Jumeau v Savy* (1933) MR 44, Petrides CJ stated "... I may however state that in my opinion Article 1341 applies only as between contracting and not third parties". In *Soondrum v Curpen* (1936) MR 139 the Court stated:

In the case of *Jumeau v Savy* this Court has already decided that prohibition

against oral evidence is applicable only as between the parties to a contract and not in regard to third parties. Here the Defendant not being a party to the contract cannot avail himself of the prohibition contained under Article 1341...

In *Faure v Vidot* (CS 203 of 1991) in similar circumstances, I ruled that - "there is therefore no doubt as to the requirement of writing to prove "consent to build", which is a contract". However an objection under Article 1341 of the Civil Code can only be raised by parties to such a contract". More recently in the case of *La-y-La (Ptv] Ltd v Adelaide* (185 of 2000), Juddoo J citing the above authorities with approval stated:

The Plaintiff pleads that no consent was granted for the Defendant to build on his land. The Defendant claims that such consent had been granted by the Plaintiff's predecessor in title. Hence the contract to consent to build, if any, is alleged to have been between the Plaintiff's predecessor in title and the Defendant. Accordingly the Plaintiff being a third party to the alleged contract cannot avail itself of the prohibition under Article 1341.

In the present case therefore, the Defendant being a third party to the alleged "consent to build", which was a contract, cannot avail herself of the prohibition contained in Article 1341. Accordingly, the objection is overruled.

**Record: Civil Side No 20 of 2003**