Who Owns the Structure when an Owner attaches items to Common Property?

When a lot owner attaches items to common property, ownership can shift to the Owners Corporation if the items become fixtures. However, if the items encroach upon the airspace of a lot, this may constitute trespass.

When a lot owner attaches or installs items to lot property, it becomes part of the lot property. The concept flows from the basic definition of fixtures, which means "*an asset or piece of equipment that is installed or otherwise fixed to the land, so as it becomes part of the land."* But what happens when a lot owner affixes equipment or assets to common property? Would the asset, otherwise owned by the lot owner become part of the common property? Does it amount to trespass of lot owner's airspace?

Lot or Common Property?

Who owns the equipment remains subjective to the scenario in hand. In a case where the equipment is so attached to the land that it has become a fixture, it may be regarded as part of the common property, thus the ownership may be vested in the Owners Corporation.

But what if the installed item is now common property, but located within the lot airspace, is it not then encroaching or trespassing upon the lot?

While strata lots are land for legal purposes, their physical character is a cubic space of air, not land. The location of that cubic space of air is ascertained from the floor plan for the lot contained in the strata plan. If the equipment is attached to common property and becomes a fixture, but it is located in the air space of the lot property, there is an encroachment or trespass of that lot property's air space by the actions of the lot owner.

Would the outcome be any different, if there is a grant of exclusive use by-law of that common property area and the lot owner attaches equipment or items to that area?

Noting the comments of Brereton J in *Stolfa v Owners Strata Plan 4366 & ors [2009] NSWSC 589* at [84] where His Honour noted that, "*a grant of exclusive use of common property does not deprive it of its character as common property……..the effect of a lot owner building on common property is not to incorporate common property into the lot, but to improve the common property [Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46, 54E-F]*."

Unless the land is registered or incorporated into the lot property, it will remain common property.

Trespass?

In common law, Trespass means interfering with and/or damaging someone else's property without permission, either intentionally, directly or negligently. Attaching items or equipment to common property may either damage or improve the common property, and if the attachment is unauthorised it will be regarded as trespass.

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2022.

If the equipment is moveable and capable of individual ownership, then it comes under the definition of “chattel” and is not regarded as a part of the common property. In that scenario, the ownership of the chattel remains with the lot owner who installed the equipment or items.

In determining whether the equipment attached is a fixture or not, it should be considered if at the time of registration of the strata plan, the equipment was there or not. If the equipment has been installed on the lot property prior to the registration of the strata plan and is for the benefit of other lots, then equipment may come under the definition of “common infrastructure” pursuant *to Strata Schemes Development Act 2015*, and in that case, it will not be regarded as trespass or encroachment of the lot.

Encroachment?

When part of a building or fixture from one property intrudes or overhangs into someone else’s property in such a way that it violates the real property rights of the other owner, then it is regarded as an encroachment.

A lot owner might be legally entitled to fix or keep its property on common property for various reasons. It may have an easement or a licence or an exclusive use by-law or a lease of the relevant land. It may have an entitlement that arises from an equitable or proprietary estoppel enforceable against the land owner. If it lacks any such entitlement then, at law, the owner of the equipment, whether fixture or chattel is trespassing on lot property. If the relevant property is a fixture then this is characterised as an encroachment. If the relevant property is a chattel then the relevant law is relating to uncollected goods.

Determination of the above issues is complicated and would need thorough analysis of facts and issues warranting assistance of experts.

Key takeaways

- Items attached to common property may become fixtures and thus part of that property.
- Trespass occurs when a lot owner's attachment to common property is unauthorized.
- The nature of the attachment determines whether it is a fixture or chattel.
- Exclusive use by-laws do not change the status of common property.
- Encroachment occurs when a fixture intrudes into another property owner's rights.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

Prepared by Bannermans Lawyers
16 March 2022

BANNERMANS LAWYERS
T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2022.