

Litigating the enforcement of building covenants

Part 1

Introduction

1. The enforceability of building covenants is quite cumbersome in Queensland. Generally, they need to be enforced contractually. This can be very time consuming and costly. I was recently involved in a series of cases enforcing building covenants on a housing estate. Given the limited authorities relating to the enforcement of covenants in Queensland, I thought it useful to write about those recent cases and my experiences in them to identify matters would be helpful in enforcing covenants in other litigation.
2. The parties and the covenants were referred to by Morrison JA in his judgment in the last decision in this saga, and it is convenient to set them out at the start, they were:¹

[5] The applicant, BGM Projects Pty Ltd (“BGM”) is the developer of “On the Beach” at Burrum Heads. The contracts for the sale of individual lots in the development included a series of covenants governing the design and construction of dwellings on those lots. The introductory words of the covenants were as follows:

“This Covenant is an agreement between the Developer, BGM Projects Pty Ltd (“BGM Projects”), who is committed to providing a quality residential environment, and the Buyer who intends to construct a dwelling. This Covenant defines the quality of the completed project, both environmentally and aesthetically.

Many items will reflect the design requirements of the Fraser Coast Regional Council, whilst others reflect the ‘liveability’ vision of the completed project and are a natural product of the unique beachfront and lakeside topography.

Buyers may take comfort in the knowledge that their investment is not devalued by an ill-balanced mix of poorly designed houses or temporary dwellings.”

[6] On 7 September 2018 Durmaz Corporation Pty Ltd purchased a lot from an existing owner, Mr Smith. The contract of sale included Special Condition 2 in these terms:

“2.(a) The buyer acknowledges that every person that purchases land at On the Beach (of which the land sold in this contract forms part) is required to comply with the attached Community Development Standards and Building Covenant Conditions;

(b) The buyer agrees to sign the attached Continuation of Covenant and to be bound in all respects by the said covenants from date of settlement of this contract.

¹ *BGM Projects Pty Ltd v Durmaz* [2020] QCA 146.

- (c) The buyer agrees to cause any person to whom he sells the land to complete and sign a notification in the same terms and deliver it to BGM Projects Pty Ltd.”

[7] The covenants were Annexure A to that contract. Annexures C and D were Deeds in favour of BGM, executed on behalf of Durmaz Corporation by Mr Durmaz.’

3. There were a number of matters before the Supreme Court that will each be the subject of a separate article:
- (a) interlocutory injunction regarding construction (**Construction Injunction**);
 - (b) injunction preventing the transfer of the land without obtaining deeds in favour of BGM (**Transfer Injunction**);
 - (c) mandatory injunction for removal of the shed constructed on the land (**Shed**)(**Final Injunction**);
 - (d) appeal to the Court of Appeal against the granting of the Final Injunction and striking out of the notice of appeal (**Appeal Proceeding**); and
 - (e) application for a substituted performance order (**Substituted Performance Order**).²

4. This article will deal with the Construction Injunction.

Construction Injunction

5. The events giving rise to the application for the Construction Injunction were conveniently summarised by his Honour Morrison JA in the Appeal Proceeding, as follows:

- [8] On 31 March 2019 Mr Durmaz placed a caravan on the property, indicating that he intended to live in it. Despite being told that having a caravan was in breach of the building covenants, Mr Durmaz stated he would not remove it.
- [9] On 1 April 2019 Mr Durmaz informed BGM’s contract administrator that he intended to build any house he wanted on the property, and did not intend to submit any building plans to BGM for approval, or to otherwise comply with the building covenants.
- [10] By 22 May 2019 BGM became aware that Mr Durmaz had commenced construction works for a shed. Following objection by BGM, the solicitors for each side corresponded about the failure to obtain approvals under the building covenants. Mr Durmaz, for Durmaz Corporation, said it would undertake in writing to comply with the building covenants. That undertaking was supplied to BGM.

² I was led in application for the Transfer Injunction by Mr O’Brien QC and in the application for the Final Injunction by Mr Keim SC.

[11] Subsequently, Mr Durmaz caused a concrete slab to be poured, without approval.'

6. It was on the morning of 4 June that Mr Durmaz started to pour a concrete slab on the property. Shortly after work started, I received a call from my Instructing Solicitor and he asked me what I was doing today. When you get that call, you know that you are probably going to be off to court or drafting something, urgently. In this case, it turned out to be the former.
7. It was clear, given the history of this matter, that works would continue unless an injunction was obtained. When you are faced with this situation, it is easier to get an injunction preventing someone from building something than to get them to take it down.³ As a result, speed is important. We made arrangements to meet and settle an application, some basic material and a draft order and, subsequently, after contact with the Registry, forwarded it to the senior judge listed in Applications that day. It was intended to proceed *ex parte* but, ultimately, contact was able to be made with the respondent's director.
8. Obtaining an urgent injunction is about as far from a 'set piece' as one can get in practice as counsel. The only way it could have been more so was if we simply needed to walk over to court.
9. While the material was brief, it addressed the central matters to be addressed in applications of this type, that is: a serious question to be tried/ *prima facie* case; and the balance of convenience.⁴ Of particular importance for this type of matter was also consideration of, and addressing, the issue of whether damages would be an adequate remedy.⁵
10. Arrangements were made with his Honour Justice Applegath's Associate for a suitable time and for Durmaz Corporation's sole director to attend the hearing on his mobile.

³ *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited* [1991] 1 Qd R 301.

⁴ *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622-623 (Kitto, Taylor, Menzies, Owen JJ). The *prima facie* case requirement is that there is sufficient likelihood of success at trial to justify in the circumstances the preservation of the status quo pending the trial: *ABC v O'Neill* (2006) 227 CLR 57, [65], [70] (Gummow and Hayne JJ).

⁵⁵ See *Samsung Electronics Ltd v Apple Inc* (2011) FCR 238, [61] (Dowsett, Foster and Yates JJ).

The Court granted the Construction Injunction. The order included a requirement to serve the material and order by email, the reservation of costs, and liberty for the respondent to apply.

11. At this stage of the matter, the lessons were more about practice than the substantive law relating to restrictive covenants. Those lessons were:

- (a) the importance of having a precedent draft application and order, which made the drafting of the documents for the instant matter much easier;
- (b) being familiar with, and having available, the key authorities, as this meant that there was no scramble to locate cases and allowed focus on important matters;
- (c) some material is better than none, and the more that can be prepared the better (which segues neatly to the last lesson);
- (d) it is very helpful to have an experienced instructing solicitor.

12. The next instalment will deal with the Transfer Injunction and highlight a number of matters of substantive law, as well as of practice.

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