SUPREME COURT OF QUEENSLAND

CITATION:	*Bettson Properties Pty Ltd & Anor v Tyler* [2018] QSC 153
PARTIES:	**BETTSON PROPERTIES PTY LTD ACN 009 873 152 AND TOBSTA PTY LTD ACN 078 818 014** (applicants) **v** **PAULINE AUDREY TYLER** (respondent)
FILE NO/S:	No 1996 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2018
JUDGE:	Burns J
ORDER:	**The orders of the court are that:** **1. The application be dismissed;** **2. The applicants pay the respondent's costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	REAL PROPERTY – RESTRICTIVE COVENANTS – OTHER COVENANTS – where the respondent purchased a lot in a residential estate from the applicants and erected a house on that lot – where the contract of sale included a covenant requiring the applicants' consent to the installation of any solar panels – where the covenant provided for the refusal of consent where the applicants considered the proposed installation would "cause visual impact" or not be "aesthetically pleasing" – where the respondent installed solar panels on the roof of the house without the applicants' consent – where retrospective consent was refused – whether the respondent should be required to remove the solar panels – whether the covenant is of no force or effect by reason of the provisions of Part 2 of Chapter 8A of the *Building Act* 1975 (Qld)

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Building Act 1975 (Qld), s 246L, s 246M, s 246N, s 246O, s 246P, s 246Q, s 246R, s 246S

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27, cited
Gittos v Surfers Paradise Rock & Roll Café Pty Ltd & Anor [2009] QCA 306, followed
Lacey v Attorney-General for the State of Queensland (2011) 242 CLR 573, cited
Nominal Defendant v GLG Australia Pty Ltd (2006) 228 CLR 529, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, cited

COUNSEL:	R A Quirk for the applicants M T de Waard for the respondent
SOLICITORS:	Clinton Mohr Lawyers for the applicants Kelly Legal for the respondent

[1] In 2009, the *Building Act* 1975 (Qld) was amended to support "sustainable housing".[1] The amendments target body corporate by-laws, residential development building covenants and the like that have the effect of restricting owners from using a range of sustainable building features.[2] One such feature is photovoltaic cells[3] or, as they are more commonly known, solar panels. Covenants that prohibit or restrict the installation of solar panels on the roof or other external surface of a prescribed building merely for the purpose of preserving the external appearance of the building are, by operation of the amendments, of no force or effect.[4] Similarly, where the consent of an entity such as a developer is required to install solar panels, consent cannot be withheld merely to enhance or preserve the external appearance of the building.[5]

[2] This decision concerns the effect, if any, of these amendments on a building covenant contained in a contract for the sale of a residential allotment situated at Griffin in the northern suburbs of Brisbane.

Background

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1 Section 246L.

2 See Explanatory Notes to the *Building and Other Legislation Amendment Bill* 2009 (Qld), p 2.

3 See eg, s 246O(1)(d).

4 Sections 246O and 246Q.

5 Section 246S.

[3] The applicants trade under the name of Oxmar Properties and are the developers of a staged residential and commercial development known as "Griffin Crest". By a contract of sale dated 21 July 2014, the applicants sold a proposed lot in the estate to the respondent who subsequently obtained registration and erected a house on the land in the following year.

[4] The contract of sale incorporated a number of special conditions requiring the buyer to comply with various building covenants which were set forth in an annexure.[6] Clause 1.26 was in these terms:

> "The Buyer shall submit to the Seller, plans for covenant approval indicating the size, number and location of any solar panels. Any panels that are considered by the Seller to cause visual impact or are not aesthetically pleasing, will not be approved.
>
> The Buyer shall not proceed with affixing solar panels to any roof or structure until it has received the consent in writing for the same from the Seller and then only in accordance with the terms of the Seller's consent."[7]

[5] On 27 December 2016, the respondent entered into an agreement with a contractor for the installation of solar panels on the roof of her home.[8] The contractor advised her that the best location for the panels to maximise their efficiency would be the north-eastern quadrant of the roof and, on 24 January 2017, they were installed in that position.

[6] The installation of the solar panels quickly came to the attention of the applicants. They were concerned not only because the panels had been installed without their consent but also because they were "in a highly visible location that adversely affected the aesthetics of Griffin Crest".[9] After initial telephone contact with the respondent, on 9 February 2017 the applicants forwarded a letter to the respondent in which they required her to immediately remove the panels and relocate them to a different position on the roof.[10] The respondent was not wildly enthusiastic about doing so. Follow-up correspondence on 21 March 2017 and 24 April 2017 resulted in a meeting on-site on 28 April 2017, but that failed to resolve the impasse.

[7] On 10 May 2017, the solicitors for the applicants wrote to the respondent in terms asserting that the installation was in breach of cl 1.26. They called on her to relocate the solar panels, failing which an application to the court for a mandatory injunction obliging her to do so was threatened. Relevantly, they stated:

> "Contrary to your obligations, you have installed solar panels on the roof of your dwelling without consent from our client [sic] and in a manner that causes an adverse visual impact for other residents in the estate, and is not aesthetically

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6 Affidavit of J R Murphy field on 23 February 2018, ex JM-2.

7 J R Murphy, Ex JM-2, p 10

8 Affidavit of P A Tyler filed by leave on 15 March 2018, ex PAT-1, p 7.

9 Affidavit of A L Leahy filed on 23 February 2018, par 6.

10 P A Tyler, ex PAT-1, p 14

pleasing to other residents in the estate."[11] [Emphasis added]

[8] On 26 May 2017, the respondent forwarded a letter to the applicants in which she attached an application for retrospective approval of the installation of the solar panels[12] but, by letter from the solicitors for the applicants dated 31 May 2017, the respondent was advised that her application was refused. Their letter included this:

> "[O]ur client does not approve your application on the basis that the solar panels are located in a position that causes an adverse visual impact for other residents in the estate, and is not aesthetically pleasing to other residents in the estate.
>
> Our clients require you to relocate the solar panels to the southern side of the lower roof which faces your neighbour at Lot 147. …
>
> We are instructed that if you fail to relocate the solar panels situated on the roof of your residence as required in the preceding paragraph by 5pm on 12 June 2017 we are instructed that our clients will, without further notice to you, make an application to the Supreme Court for an urgent mandatory injunction obliging you to do so."[13] [Emphasis added]

[9] By email dated 8 June 2017, the respondent advised the solicitors for the applicants that she would now accede to their demand, albeit most reluctantly, and remove the solar panels.[14] However, not long after, she became aware of the sustainability provisions of the Act and, on 22 June 2017, she wrote to the applicants to bring them to their attention. She expressed the opinion that cl 1.26 was "non-binding" in light of those provisions.[15] The respondent added that she had therefore "cancelled the removal of the solar panels from [her] roof".[16]

[10] By letter dated 4 July 2017, the applicants' solicitors contested that the Act provided any basis for her opinion. Amongst other things, they said:

> "The Building Act provides that an obligation in a covenant that prohibits the installation of a solar panel has no force or effect.
>
> In particular, section 246Q(2) provides that for a covenant to be unenforceable the restriction must apply for the purpose of enhancing the external appearance of the building and prohibit the installation of solar panels on the roof.
>
> Our client's covenants do not prohibit the installation of solar panels on the roof of your building; they merely dictate the location of those solar panels.

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11 A L Leahy, ex AL-2.

12 Ibid, ex AL-3.

13 Ibid, ex AL-4.

14 Ibid, ex AL-5.

15 P A Tyler, ex PAT-1, p 13.

16 Ibid.

> Further, our covenants are not concerned with the appearance of your building in isolation, rather they are concerned with the appearance of the entire estate."[17]

[11] Subsequently, correspondence passed between the solicitors for the applicants on the one hand and the respondent (as well as a firm of solicitors who were retained on her behalf for a time) on the other hand. The correspondence reflects many of the same arguments that were advanced to the court on the hearing of the application and, it may be observed, the substantial difference in opinion as to the proper construction of the relevant provisions of the Act.

[12] The sole director of both applicants, Mr Phillip Murphy, has a long and successful history in land development. He deposed to being "passionate about developing residential estates to the highest possible standard so that people who buy land or houses in the residential estates that [he develops], including Griffin Crest, enjoy living in those estates and are able to maximise the value of their land".[18] To achieve this, he does a number of things including "requiring buyers of lots in all of [his] estates, including Griffin Crest to enter into building covenants which set those high standards and require people to comply with them".[19] He expressed the following concerns:

> "I am very concerned that if the Applicants do not use their best endeavours to ensure compliance with the Building Covenants so that solar panels are, where possible, located on parts of properties in the estate that do not adversely affect the aesthetics of the estate, the value of Griffin Crest and land and houses in the Griffin Crest will be diminished, resulting in lost revenue for the Applicants and lost capital value for owners of houses in Griffin Crest which, while being significant, is not possible to easily quantify generally or in relation to the specific breaches by the Respondent of Building Covenants".[20]

[13] On the other hand, the current positioning of the solar panels on the roof is important to the respondent. The installation has already resulted in significant savings in the cost of electricity and she understandably wants to continue to maximise those savings. If she is required to remove the panels, the cost will be $700.[21] The total cost to relocate them to another part of the roof will be $1,567.50.[22] Of perhaps greater concern to the respondent is that, if the solar panels are relocated from the north-eastern quadrant of the roof to the south-eastern quadrant as currently proposed by the applicants, they will not function as well. In that regard, a solar panel expert engaged by the applicants, has expressed the opinion that, if relocated, the panels will still be "viable" but they will be "approximately fifteen to twenty per cent less

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17 A L Leahy, ex AL-7.

18 Affidavit of P R Murphy filed on 23 February 2018, par 7.

19 Ibid, par 7(c).

20 Ibid, par 10.

21 P A Tyler, par 31(c).

22 Ibid, par 34.

efficient".[23]

[14] By their Amended Originating Application, the applicants seek a declaration that the solar panels were installed in breach of cl 1.26 and, further, a mandatory injunction requiring the respondent to relocate them to the south-eastern quadrant of the roof. However, as the applicants acknowledged at the hearing of the application, if their arguments are accepted by the court, the appropriate order will be for the removal of the solar panels, it being a matter for the respondent to decide whether she then wishes to relocate them to the position approved by the applicants.[24]

Building Act 1975 (Qld) – Provisions to support sustainable housing

[15] The provisions in question are to be found in Part 2 of Chapter 8A of the Act.

[16] Division 1 outlines the purpose of Part 2 (s 246L), supplies a number of definitions (s 246M) and makes clear to which instruments the provisions of Part 2 apply (s 246N). By s 246L, the purpose of Part 2 "is to regulate the effect of particular instruments on stated activities or measures likely to support sustainable housing".

[17] Division 2 is comprised of the following provisions:

> "**Division 2 Limiting effect of prohibitions etc. for particular sustainable housing measures**
>
> **246O Prohibitions or requirements that have no force or effect**
>
> (1) This section applies to a relevant instrument that, but for this section, would have the effect of—
>
> (a) prohibiting the use of a colour for the roof of a class 1a building or an enclosed class 10a building attached to a class 1a building, if using the colour would achieve a solar absorptance value for the upper surface of the roof of not more than 0.55; or
>
> (b) prohibiting—
>
> (i) the use in a prescribed building of a window that is energy efficient; or
>
> (ii) the treatment of a window in a prescribed building to ensure the window is energy efficient; or
>
> (c) requiring—
>
> (i) a minimum floor area for a class 1a building, but not a minimum frontage unless the requiring of a minimum frontage has the effect of construction of a less energy efficient

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[23] Affidavit of J B Stringer filed on 23 February 2018, par 7.

[24] Transcript, 1-10, 1-20.

building; or

(ii) a minimum number of bathrooms or bedrooms for a class 1a building; or

(iii) a class 1a building or an enclosed class 10a building attached to a class 1a building to be orientated on a parcel of land in a particular way, if orientating the building in the particular way would have the effect of construction of a less energy efficient building; or

(d) prohibiting the installation of a solar hot water system or photovoltaic cells on the roof or other external surface of a prescribed building.

(2) For a prohibition or requirement mentioned in subsection (1)(a) to (c), the relevant instrument has no force or effect to the extent of the prohibition or requirement.

(3) For a prohibition mentioned in subsection (1)(d), the relevant instrument has no force or effect to the extent the prohibition applies merely to enhance or preserve the external appearance of the building.

Example of prohibition applying for other than a purpose mentioned in subsection (3)—

The installation of a solar hot water system with a roof storage tank on a roof might be prohibited because an engineering report shows the system would be too heavy for the roof.

246P Restrictions that have no force or effect—roof colours and windows

(1) This section applies to a relevant instrument that, but for this section, would have the effect of—

(a) restricting the use of a colour for the roof of a class 1a building or an enclosed class 10a building attached to a class 1a building, if using the colour would achieve a solar absorptance value for the upper surface of the roof of not more than 0.55; or

(b) restricting—

(i) the use in a prescribed building of a window that is energy efficient; or

(ii) the treatment of a window in a prescribed building to ensure the window is energy efficient.

(2) For a restriction mentioned in subsection (1), the relevant instrument has no force or effect to the extent the restriction prevents a person—

(a) using a colour for the roof of the building to achieve a solar absorptance value for the upper surface of the roof of not more than 0.55, if use of the colour—

(i) minimises potential adverse effects on the external appearance of the building; and

(ii) does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building; or

(b) using in a prescribed building a window that is energy efficient or treating a window in a prescribed building to ensure the window is energy efficient, if the type of window to be used or the treatment—

(i) minimises potential adverse effects on the external appearance of the building; and

(ii) does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building.

246Q Restrictions that have no force or effect—other restrictions

(1) This section applies to a relevant instrument that, but for this section, would have the effect of restricting the location on the roof or other external surface of a prescribed building where a solar hot water system or photovoltaic cells may be installed.

(2) For a restriction mentioned in subsection (1), the relevant instrument has no force or effect to the extent the restriction—

(a) applies merely to enhance or preserve the external appearance of the building; and

(b) prevents a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface of the building.

Example of restriction applying for other than a purpose mentioned in subsection (2)—

The installation of a solar hot water system at a particular location on a roof may be restricted to maximise available space for the installation of other hot water systems or to prevent noise from piping associated with the system causing unreasonable interference with a person's use or enjoyment of the building.

246R When requirement to obtain consent for particular activities can not be withheld—roof colours and windows

(1) This section applies if, under a relevant instrument, the consent of an entity is required to—

(a) use a colour for the roof of a class 1a building or an enclosed class 10a building attached to a class 1a building; or

(b) use in a prescribed building a window that is energy efficient or treat a window in a prescribed building to ensure the window is energy efficient.

(2) The entity can not withhold consent for an activity mentioned in subsection

(1)(a) if use of the colour—

(a) achieves a solar absorptance value for the upper surface of the roof of not more than 0.55; and

(b) minimises potential adverse effects on the external appearance of the building; and

(c) does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building.

(3) The entity can not withhold consent for an activity mentioned in subsection (1)(b) if the type of window to be used or the treatment—

(a) minimises potential adverse effects on the external appearance of the building; and

(b) does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building.

(4) A requirement under this section to not withhold consent—

(a) is taken to be a requirement under the relevant instrument; and

(b) applies to the relevant instrument despite any other provision of the instrument.

246S When requirement to obtain consent for particular activities can not be withheld—other matters

(1) This section applies if, under a relevant instrument, the consent of an entity is required to install a solar hot water system or photovoltaic cells on the roof or other external surface of a prescribed building.

(2) The entity can not withhold consent for an activity mentioned in subsection (1) merely to enhance or preserve the external appearance of the building, if withholding the consent prevents a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface of the building.

(3) A requirement under this section to not withhold consent—

(a) is taken to be a requirement under the relevant instrument; and

(b) applies to the relevant instrument despite any other provision of the instrument."

Consideration

[18] There can be no doubt that the respondent failed to comply with cl 1.26. Instead of submitting a plan for the installation of solar panels as that clause requires, and without the consent of the applicants, she caused solar panels to be erected on the roof of her home. When, subsequent to their installation, she sought consent, it was refused on grounds that are expressly contemplated by cl 1.26, that is to say, that the solar panels were "considered by the [applicants] to cause a visual impact or are not aesthetically pleasing". The question for

determination, however, is whether cl 1.26 has any force or effect in light of the provisions of Part 2 of Chapter 8A of the Act.

[19] In the construction of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[25] The purpose of an Act "resides in its text and structure".[26] It may appear from an "express statement in the relevant statute" or "by inference from its terms and by appropriate reference to extrinsic materials".[27] Of course, here, there is an express statement. By s 246L, the purpose of Part 2 "is to regulate the effect of particular instruments on stated activities or measures likely to support sustainable housing". As to extrinsic material, consideration may be given to such material to provide an interpretation if the provision is ambiguous or obscure, if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, or to confirm the interpretation conveyed by the ordinary meaning of that provision,[28] but it "cannot be relied on to displace the clear meaning of the text".[29] Rather, because the duty of the court "is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have",[30] where the meaning is clear, the provision must be given that construction.

[20] That the contract of sale is a "relevant instrument" and that the house constructed by the respondent is a "prescribed building", both within the meaning of s 246M of the Act, are uncontroversial. Indeed, the applicants rightly concede that the provisions of Part 2 of Chapter 8A apply to the contract.[31]

[21] There are three provisions of possible relevance – s 246O, s 246Q and s 246S.

Section 246O – Prohibitions or requirements that have no force or effect

[22] Section 246O is concerned with covenants that would have the effect of, relevantly, prohibiting the installation of solar panels on the roof of a prescribed building: s 246O(1)(d). Such a covenant will be of no force or effect to the extent that the prohibition applies merely to enhance or preserve the external appearance of the building: s 246O(3).

[23] The respondent was correct to submit that s 246O does not have any invalidating effect on cl 1.26.[32] That is because the clause does not by its terms, or in its effect, amount to a prohibition

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25 *Acts Interpretation Act* 1954 (Qld), s 14A(1).

26 *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573, [44].

27 Ibid.

28 *Acts Interpretation Act* 1954 (Qld), s 14B(1).

29 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [47]. And see *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529, [22].

30 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].

31 Outline of Submissions on behalf of the Applicants, par 17.

32 Transcript, 1-22.

within the meaning of that provision. Rather, cl 1.26 provides a mechanism for the applicants as sellers to exercise control over the size, number and location of solar panels on a roof. Although the clause makes clear that "any panels that are considered by the [applicants] to cause visual impact or are not aesthetically pleasing, will not be approved", that does not mean that approval will be withheld for a proposal that does not offend that prescription. Viewed in that way, cl 1.26 operates to restrict the size, number or location of solar panels on a roof but it does not of itself prohibit the installation of solar panels.

Section 246Q – Restrictions that have no force or effect

[24] Unlike s 246O, s 246Q is not concerned with covenants *prohibiting* the installation of solar panels; it is concerned with covenants that would have the effect of *restricting* the location on the roof where solar panels may be installed: s 246Q(1). Such a restriction will be of no force or effect to the extent that it applies merely to enhance or preserve the external appearance of the building and it prevents a person from installing, relevantly, solar panels on the roof or other external surface of the building: s 246Q(2).

[25] It is obvious that s 246Q applies to cl 1.26. For the reasons expressed above (at [23]), cl 1.26 would, but for s 246Q, have the effect of restricting the location on the roof where solar panels may be installed: s 246Q(1). Accepting that to be the case, the next question is the extent, if any, that the restriction has force or effect by operation of the provision.

[26] The answer to that question is supplied by s 246Q(2): the restriction has no force or effect to the extent that it (a) applies merely to enhance or preserve the external appearance of the building and (b) prevents a person from installing solar panels on the roof. Because (a) and (b) are conjunctive, both must be satisfied before the restriction will be rendered ineffective. As such, the covenant will be of no force or effect to the extent that it applies merely to enhance or preserve the external appearance of the building *and* it prevents a person from installing solar panels on the roof of the building.

[27] The applicants accept that (a) is satisfied but contend that (b) is not. They argue that cl 1.26 does not by its terms *prevent* the installation of solar panels on a roof; it does no more than to reserve to the applicants the last say as to the size, number and location of the panels on the roof. The applicant submitted that s 246Q only operates where the purchaser is prohibited by the relevant instrument from installing solar panels on the roof.[33] Their contention is that a person will only be prevented from installing solar panels within the meaning of s 246Q(2)(b) where he or she is forbidden from doing so. They argue that where, as here, approval is given to a purchaser to install solar panels in a different location to that which was the subject of the purchaser's application, the purchaser has not been *prevented* from installing solar panels. Therefore, they argue, s 246Q cannot have any operation.

[28] There are a number of difficulties with the applicants' construction.

[29] *First*, s 246Q must be read as a whole and in the context of the other provisions of the Act. In this respect, the other provisions contained in Part 2 of Chapter 8A loom large. If the

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[33] Transcript, 1-17.

applicants' construction is correct, it would mean that the only restriction which would fall foul of s 246Q is one which prohibits the purchaser from installing solar panels anywhere on the roof. If that is correct, it would leave no work for s 246O to do. Furthermore, s 246Q(1) makes it clear that s 246Q applies to covenants that would have the effect of restricting the location on the roof or other external surface of a prescribed building where solar panels may be installed. That section must be read as a whole and, when it is, the applicants' argument – that a covenant reserving to the developer a power to restrict the location on the roof of the solar panels does not contravene the provision – cannot be supported.

[30] *Second*, as McMurdo P observed in *Gittos v Surfers Paradise Rock & Roll Café Pty Ltd & Anor*,[34] the meaning of the word "prevent" depends on, and will vary with, the context in which it is used. The primary definition in the Macquarie Dictionary of "prevent" is "to keep from occurring; hinder". To "hinder" is "to interrupt, check or retard". In the context in which "prevents" appears in s 246Q(2), that word takes its meaning from the balance of s 246Q(2) as well as s 246Q(1) and the other provisions of Part 2. In particular, it is clear from the opening words of s 246Q(2) that the restriction about which it is concerned is a restriction as to the location of solar panels on the roof and the terminology employed – "prevents" – is to be contrasted with the terminology used in the other provisions of Part 2 that deal with prohibitions.[35] Considered in that light, the applicants' construction to the effect that "prevents" means "prohibits" cannot be accepted. Instead, in the context in which the word is used in s 246Q(2)(b), "prevents" should be taken to mean hinders or impedes.

[31] *Third,* the applicants' construction, if correct, would lead to the absurd result that the applicants could, for example, require the respondent to install the solar panels in an area of perpetual shade without contravening s 246Q. Such an outcome would hardly meet the clear legislative intent to promote and preserve sustainable housing.

[32] *Fourth*, some confirmation of the construction I have arrived at (in [30]) may be found in the policy rationale set forth in the Explanatory Notes to the *Building and Other Legislation Amendment Bill* 2009 (Qld):

> ""**Ban the banners"**
>
> The "ban the banners" policy aims to stop bodies corporate and developers from restricting the use of sustainable building elements and features. This will be achieved by rendering invalid new covenants and body corporate statements/by-laws which restrict owners or bodies corporate from using selected sustainable and affordable features such as light roof colours, smaller minimum floor areas, fewer bedrooms and bathrooms, types of materials and surface finishes to be used for external walls and roofs, single garages and the appropriate location for solar hot water systems and photovoltaic cells."[36] [Emphasis added].

[33] It follows that, because the relevant effect of cl 1.26 is to restrict the location on the roof

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34 [2009] QCA 306, [3]. And see Muir JA at [27] and [28].

35 See, eg, s 246O.

36 At p 2-3.

where solar panels may be installed in any case where the panels are considered by the applicants to cause a visual impact or are not aesthetically pleasing, it is a covenant that by its very terms hinders or impedes the respondent from installing solar panels. To that extent, it is by reason of s 246Q of no force or effect.

Section 246S – When requirement to obtain consent for particular activities can not be withheld

[34] Section 246S applies if, under a relevant instrument, the consent of an entity is required to install, relevantly, solar panels on the roof of a prescribed building: s 246S(1). In such circumstances, the entity cannot withhold consent for the installation of solar panels merely to enhance or preserve the external appearance of the building "if withholding the consent prevents a person from installing" solar panels on the roof: s 246S(2).

[35] Because I have found that cl 1.26 is of no force or effect to the extent that it operates to restrict the location on the roof where solar panels may be installed in any case where the panels are considered by the applicants to cause a visual impact or are not aesthetically pleasing, it is not necessary to consider s 246S. However, for the sake of completeness, if cl 1.26 was a valid covenant, it would not be open to the applicants to withhold consent to the installation on the basis notified in their solicitors' letter of 31 May 2017, that is to say, because the "solar panels are located in a position that causes an adverse visual impact for other residents in the estate, and is not aesthetically pleasing to other residents in the estate".[37] In that regard, the word "prevents" in s 246S(2) should be taken to have an equivalent meaning as that which I have ascribed to the same word in s 246Q(2)(b).

Conclusion

[36] For these reasons, the whole premise for the applicants' demands of the respondent to remove the solar panels as well as the relief claimed in this proceeding cannot be made out.

[37] The application must therefore be dismissed with costs.

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37 A L Leahy, ex AL-4.