SUPREME COURT OF QUEENSLAND

CITATION:	*Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176
PARTIES:	**BETTSON PROPERTIES PTY LTD** ACN 009 873 152 **TOBSTA PTY LTD** ACN 078 818 014 (appellants) **v** **PAULINE AUDREY TYLER** (respondent)
FILE NO/S:	Appeal No 8215 of 2018 SC No 1996 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 153 (Burns J)
DELIVERED ON:	6 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2018
JUDGES:	Sofronoff P and Fraser JA and Mullins J
ORDERS:	**1. Allow the appeal and set aside the orders made in the Trial Division.** **2. Declare that the respondent installed solar panels on the roof at 1 Leapai Parade, Griffin in the State of Queensland, more particularly described as Lot 148 on SP 267663, title reference 50967239 ("1 Leapai Parade") in breach of clause 1.26 of the Special Conditions Annexure "A" of the Contract dated 21 July 2014.** **3. Order that the respondent by herself, and/or her servants, agents or otherwise remove or, at the option of the respondent, relocate the installed solar panels on the roof at 1 Leapai Parade, to the south-eastern side of the roof facing 26 Bettson Boulevard, Griffin in the State of Queensland, more particularly described as Lot 149 on SP 284808.** **4. The respondent is to pay the appellants' costs of the proceedings in the Trial Division and in this appeal.** **5. The appellants have liberty to apply in the Trial Division for such further or other order as may be**

necessary or convenient to give effect to the injunction in order 3.

6. If the parties are unable to agree upon the following matters they have leave to exchange and lodge in the registry within 14 days of publication of these orders an outline of submissions not exceeding five pages concerning the appropriateness of order 4 and the appropriate form of orders 2 and 3.

CATCHWORDS: REAL PROPERTY – RESTRICTIVE COVENANTS – OTHER MATTERS – where the respondent installed solar panels on the roof of her home without obtaining the prior consent of the appellants as required by a provision of the contract under which the house was purchased – where the appellants sought to enforce the relevant provision by requiring the respondent to remove or relocate the solar panels – where the primary judge held that the provision in question was deprived of force and effect by sections 246Q and 246S of the *Building Act* 1975 (Qld) – whether sections 246Q and 246S of the *Building Act* 1975 (Qld) applied to deprive the relevant contractual provision of its force and effect

Acts Interpretation Act 1954 (Qld), s 14A
Building Act 1975 (Qld), s 246L, s 246O, s 246Q, s 246S

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27; [2009] HCA 41, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
South Western Sydney Local Health District v Gould (2018) 97 NSWLR 513; [2018] NSWCA 69, cited

COUNSEL: D A Kelly QC, with R A Quirk, for the appellants
M T De Waard for the respondent

SOLICITORS: Clinton Mohr Lawyers for the appellants
Kelly Legal for the respondent

[1] **SOFRONOFF P:** I agree with Fraser JA.

[2] **FRASER JA:** A judge in the Trial Division dismissed the appellants' application for a declaration and an injunction to enforce a provision of the contract by which the appellants sold to the respondent a proposed lot in an estate developed by the appellants. The application was dismissed upon the ground that the relevant contractual provision was deprived of contractual force and effect by provisions in Part 2 of Chapter 8A of the *Building Act* 1975 (Qld).

[3] The relevant facts are not in contest.

[4] In a contract annexure headed "Building Covenant Conditions" cl 1.26 provides:

> "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 a 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 terms of the Seller's consent."

[5] Contrary to that provision the respondent engaged a contractor to install solar panels on the roof of her house on the lot without submitting the required plans to the seller or obtaining the seller's consent. The panels were installed on the north-eastern quadrant of the roof in accordance with the contractor's advice that it was the best location on the roof to maximise the panels' efficiency. That part of the roof faces the street and is visible from various places within the estate. The appellants formed the view that in the panels' location on the roof they had an adverse impact of the kind described in cl 1.26. They unsuccessfully sought to persuade the respondent to relocate the panels to the south-eastern quadrant of the roof, which is a low part of the roof facing a neighbouring house. The respondent's application to the appellants for retrospective approval of the installation of the panels was refused because the appellants considered that the panels caused an adverse visual impact for and were not aesthetically pleasing to other residents in the estate.

[6] The primary judge referred to evidence of a solar panel expert that if the solar panels were relocated to the south-eastern quadrant of the roof they would still be viable but would be up to about 20 per cent less efficient. The appellants' director deposed that he was concerned that if the solar panels were not in a location on the roof where they would not adversely affect the aesthetics of the estate the value of the estate and land and houses in it would be diminished, resulting in significant but not easily quantifiable lost revenue for the appellants and lost capital value for owners of houses in the estate.

[7] The purpose of Part 2 of Chapter 8A of the *Building Act* 1975 (Qld) is expressed in s 246L as being "to regulate the effect of particular instruments on stated activities or measures likely to support sustainable housing." For present purposes the relevant provisions are sections 246Q and 246S in Division 2 of Part 2. The primary judge concluded that s 246Q applied to deprive cl 1.26 of any force and effect and, if s 246Q did not have such an effect, s 246S precluded the appellants from withholding their consent to the installation of the solar panels in the location chosen by the respondent. Those sections provide:

> "**246Q Restrictions that have no force or effect—other restrictions**
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> (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 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.

…

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."

[8] The solar panels installed for the respondent are panels of photovoltaic cells. The appellants concede that their contract with the respondent is in a "relevant instrument" and the respondent's house is a "prescribed building", as defined in s 246M of the Act. They also concede that the purpose of cl 1.26, and their purpose in withholding consent for the installation of the photovoltaic cells at the location on the roof of the respondent's house where she installed them, was merely to enhance or preserve the external appearance of the house.

[9] The primary judge referred to other provisions in the same part of the Act, the most significant of which is s 246O (particularly s 246O(1)(d) and s 246O(3)):

"**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 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."

[10] The primary judge concluded that s 246O did not invalidate cl 1.26 because its terms and effect did not amount to a prohibition. That is not in issue in this appeal.

[11] The primary judge construed the word "prevents" in s 246Q(2)(b) and s 246S(2) as meaning "hinders" or "impedes". The primary judge considered that this meaning was indicated upon a reading of s 246Q as a whole in the context of s 246O; if the

appellants' construction were correct, the only restriction falling foul of s 246Q was one which prohibited a purchaser from installing solar panels anywhere on the roof, which would leave no work for s 246O to do. The primary judge referred to McMurdo P's statement in *Gittos v Surfers Paradise Rock & Roll Café Pty Ltd & Anor*[1] that the meaning of the word "prevent" varies with the context in which it was used. In the primary judge's view, s 246Q(1) made it clear that s 246Q applies to covenants having the effect of restricting the location of solar panels on the roof or other external surface. The primary judge referred to dictionary definitions of "prevent" which comprehend both "to keep from occurring" and "hinder", and dictionary definitions of "hinder" as meaning "to interrupt, check or retard". The primary judge considered that the appellants' construction would produce the absurd result that they could require the respondent, for example, to install the solar panels in an area of perpetual shade without a contravention of s 246Q. The primary judge preferred the meaning "hinder" for the reasons already mentioned and because of the contrast between the word "prevents" in s 246Q(2)(b) and the words "prohibiting" and "prohibition" in s 246O.

[12] The primary judge found some confirmation of that construction in a statement in the explanatory notes to the *Building and Other Legislation Amendment Bill* 2009 (Qld). The explanatory notes include a statement that a policy objective of the Bill is to "ban the banners" by stopping bodies corporate and developers from restricting the use of sustainable and affordable design features such as light coloured roofs, single garages, smaller houses and solar hot water systems. Under the heading "Policy rationale" and a sub-heading "Ban the banners", the explanatory note states that the "policy aims to stop bodies corporate and developers from restricting the use of sustainable building elements and features" and:

> "[t]his 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.
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> …
>
> While the overriding provisions cannot be varied merely for the purpose of preserving or enhancing the external appearance of the building, a body corporate will remain able to apply appropriate operational controls over the use of sustainability features to reduce any adverse impacts on affected neighbours. For example, bodies corporate may require roof finishes to have "low reflectivity" in cases where neighbours may be affected by glare or they may require that split solar hot water systems be used where the weight of roof storage units may not be supported by the roof members."

[13] The respondent endorses the primary judge's reasoning and makes some additional points. Sections 246Q and 246S are both submitted to apply because the second sentence of cl 1.26 is a "restriction" caught by s 246Q(1) and cl 1.26 also contains

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1 [2009] QCA 306 at [3].

a requirement for consent falling within s 246S(1). The respondent argues that the meaning of "prevents" in s 246Q(2)(b), and therefore also in s 246S(2), should reflect the expression "restricting the location on the roof or other external surface" in s 246Q. The appellants' construction is submitted to treat "prevents" in s 246Q(2)(b) as meaning "prohibits", thereby rendering s 246O otiose. The respondent also argues that the primary judge's construction accords with the provision in s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) that the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation; that construction gives effect to the purpose expressed in s 246L of supporting sustainable housing and to the policy objective and rationale described in the explanatory notes.

[14] The appellants submit that s 246S applies to the exclusion of s 246Q in relation to contractual provisions which do not themselves have the effect of restricting the location of solar panels on a roof but instead require the consent of an entity for the installation of solar panels on the roof. The word "prevents" was submitted to mean "to make impossible" or "to stop from happening". In the course of oral argument the appellants accepted that "prevents" also comprehends "to make impractical". The appellants argue that s 246Q does not deprive cl 1.26 of any force or effect and s 246S(2) does not preclude the appellants from withholding consent because the word "prevents" in those provisions does not describe the effect of the clause or of the appellants' withholding of consent in the particular circumstances of this case.

Consideration

[15] Reference was made in the course of argument to the example related to s 246Q(2). That example relates only to the "purpose" mentioned in s 246Q(2), meaning the purpose of a restriction described in paragraph (a) that it "applies merely to enhance or preserve the external appearance of the building". The same purpose is described in sections 246O(3) and 246S(2). It is common ground that if any of these provisions is otherwise applicable that purpose is established by the evidence.

[16] It appears from the terms of sections 246O, 246Q and 246S that each of them is designed to be the exclusive form of regulation of the kind of provision described in it. Some relevant instruments may contain different provisions falling within more than one of those sections, but the better view appears to be that cl 1.26 is a provision only of the kind described in s 246S. Upon that view, there is no room for the operation of s 246Q. That result is consistent with the effect of s 246S. Where the purpose and effect described in s 246S(2) exist, the effect of s 246S(3) is that the relevant instrument is taken to require that an entity in the position of the appellants can not withhold consent. It follows that if the only relevant effect of the instrument is to require the consent of an entity to the installation, the instrument could not have the effect described in s 264Q(1).

[17] It is not necessary to extend that analysis. The determinative question is instead whether the expression used in sections 246Q and 246S "prevents a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface of the building" comprehends a case in which the result of the restriction (s 246Q) or the withholding of consent (s 246S) is that the photovoltaic cells may be installed only at a location where they will remain viable but will operate at about 80 per cent of the efficiency that would be achieved if they were instead installed at the proscribed location. The critical word is "prevents". As the primary judge considered,

and as is common ground between the parties, "prevents" must bear the same meaning in both sections. At least one of those sections must apply if "prevents" comprehends the result of the application of cl 1.26 in this case and neither section could apply if that result does not amount to prevention.

[18] There may be cases in which a restriction or refusal of consent to installation of a solar hot water system or photovoltaic cells at a particular location makes it impossible or impracticable for a person to install a solar hot water system or photovoltaic cells on the roof or other external surface. It would be impracticable where, for example, the result of the restriction or refusal of consent is to leave available only locations where there is a practically insuperable impediment to the installation, such as inadequacy in the size of the available area or of the strength of the roof structure.

[19] What seems likely to be much more common though are cases where, although a restriction or refusal of consent creates no such impediment to the installation, it leaves available only a part of the roof which receives less sunlight because of its aspect (as in this case) or because of shading by foliage, other natural features of the landscape, or structures. In such cases there will be a reduction in energy efficiency and a corresponding reduction in the potential economic benefit of installing the solar hot water system or photovoltaic cells. If the adverse impact is significant it would tend to discourage the installation. In these circumstances, the statutory purpose expressed in s 246L ("to regulate the effect of particular instruments on stated activities or measures likely to support sustainable housing") encourages a liberal construction of the expression "prevents a person from installing" in sections 246Q and 246S such that it comprehends a case where the adverse impact is so substantial as to make it impractical to acquire and install a solar hot water system or photovoltaic cells.

[20] The respondent did not prove that this is such a case. As I have indicated, the evidence is to the effect that at the location required by the appellants the photovoltaic cells will remain viable although they will operate somewhat less efficiently than they would operate in the location where the respondent caused them to be installed. The evidence does not support any finding more favourable to the respondent and the primary judge did not find that installation at the location required by the appellants would be impractical, whether from an economic perspective or for any other reason.

[21] The construction question then is whether "prevents a person from installing" in sections 246Q and 248S connotes not only "makes it impossible, impracticable or impractical for the person to install", but also less significant adverse effects, such as "less energy efficient for the person to install".

[22] The construction of these sections must be sourced in the statutory text understood in its context, which includes the statutory purpose.[2] As the primary judge observed, an interpretation that will best achieve the purpose of an Act is to be preferred to any other interpretation[3] and that purpose "resides in its text and structure" and also may appear "by appropriate reference to extrinsic materials".[4] Dictionary meanings of such a simple and commonly used English word as

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2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47].

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

4 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44].

"prevent" provide no real assistance in determining the proper construction of these statutory provisions.[5]

[23] The text of s 246Q is not consistent with the broad meaning of "prevents" advocated by the respondent. Section 246Q is capable of operating to render of no force or effect an instrument "restricting" the location of the roof where solar panels may be installed (s 246Q(1)) only if that restriction "prevents" the installation of solar panels on the roof (s 246Q(2)(b)). Since s 246Q allows restrictions to retain their force and effect except where the restriction "prevents" the installation of solar panels that word cannot comprehend every restriction upon the location where solar panels may be installed on a roof.

[24] Sections 246O, 246Q and 246S constitute what the appellants described as "a cascading regime of provisions" concerning building covenants which:

(a) **prohibit** the installation of solar panels on the roof of a building (s 246O(1)(d) and (3));

(b) **restrict the location** on the roof of a building where a solar panel may be installed (s 246Q); and

(c) **require the consent** of an entity to install solar panels (s 246S).

[25] In the case of an outright prohibition, if the purpose of the prohibition is merely to enhance or preserve the external appearance of the building it is deprived of force and effect by s 246O(3). In the case of a restriction described in s 246Q(1) or a refusal of consent described in s 246S(1) having the same purpose, it is deprived of force or effect if it prevents such installation. Reading these provisions together, it is apparent that they are addressed to different ways in which the installation on the external surfaces of buildings of solar panels and hot water systems are commonly precluded by or under relevant instruments. With that in mind, it seems unsurprising that sections 246Q and 246S deprive a relevant instrument of force and effect only if the result of the application of the instrument in the particular case otherwise would be practically equivalent to a prohibition which would be deprived of force and effect by s 246O(3). This aspect of the statutory scheme supports the view that "prevents a person from installing" in sections 246Q and 246S connotes only "makes it impossible, impracticable or impractical for the person to install".

[26] Sections 246Q and 246S do not use expressions of the kind used elsewhere in the same Part of the Act which convey a much broader meaning. In certain circumstances s 246P deprives of force or effect a restriction upon the use in a prescribed building of an "energy efficient" window that does not "unreasonably prevent or interfere with" a person's use and enjoyment of the building or another building, whereas sections 246Q and 246S operate only where the restriction or withholding of consent "prevents" the installation. The same distinction between "prevents" and "interferes with" appears in the limitation of the operation of the relevant provisions in s 246T, in Division 3 of the same Part of the Act; relevantly, s 246T(2) provides that the operation of the Part does not create an entitlement to install a hot water system or photovoltaic cells "in a way that unreasonably prevents or interferes with a person's use and enjoyment of any part of the building". Furthermore, s 246O(1)(c)(iii) (see [9] of these reasons) refers to a requirement of

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5 See *South Western Sydney Local Health District v Gould* (2018) 97 NSWLR 513 at [78] – [82].

an instrument that would result in "a less energy efficient building", whereas the immediately following provision, s 246O(1)(d), confines the operation of s 246O(3) to prohibitions of the installation of a solar hot water system or photovoltaic cells.

[27] It is difficult to accept that the legislative purpose extended to proscribing restrictions upon or the withholding of consent for the installation of a solar hot water system or photovoltaic cells which merely interfere with their operation or render it less energy efficient when terminology of that kind was eschewed and sections 246Q and 246S instead require for their operation that the restriction or withholding of consent "prevents" the installation of a solar hot water system or photovoltaic cells.

[28] My conclusion is that the word "prevents" in sections 246Q and 246S bears its common primary meaning of "stops from happening", which comprehends cases where the result of the relevant restriction or withholding of consent is that it is impossible, impracticable, or impractical to install a solar hot water system or photovoltaic cells. In my respectful opinion there is no ambiguity in those provisions such as would allow for a construction under which "prevents" comprehends a less significant adverse result such as "less advantageous for the person to install". The sections are therefore not open to a construction under which they operate on the facts of this case.

[29] Some of the extrinsic material suggests a more extensive scope for the operation of sections 246Q and 246S. Perhaps the strongest support for that view is the statement in the explanatory memorandum that the statutory purpose "**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**." That statement was evidently intended as a short summary of the various detailed provisions which cover diverse topics concerning sustainable housing. The succinctness of that and similar short summaries necessarily involves a degree of inaccuracy. They do not reflect the marked differences in language amongst the sections which are discussed in these reasons. The obligation of the Court being to give effect to the statutory text and its meaning being clear, it cannot be displaced by the summaries in the explanatory memorandum.[6]

[30] I propose the following orders:

1. Allow the appeal and set aside the orders made in the Trial Division.

2. Declare that the respondent installed solar panels on the roof at 1 Leapai Parade, Griffin in the State of Queensland, more particularly described as Lot 148 on SP 267663, title reference 50967239 ("1 Leapai Parade") in breach of clause 1.26 of the Special Conditions Annexure "A" of the Contract dated 21 July 2014.

3. Order that the respondent by herself, and/or her servants, agents or otherwise remove or, at the option of the respondent, relocate the installed solar panels

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6 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* at [47] and [53].

on the roof at 1 Leapai Parade, to the south-eastern side of the roof facing 26 Bettson Boulevard, Griffin in the State of Queensland, more particularly described as Lot 149 on SP 284808.

4. The respondent is to pay the appellants' costs of the proceedings in the Trial Division and in this appeal.

5. The appellants have liberty to apply in the Trial Division for such further or other order as may be necessary or convenient to give effect to the injunction in order 3.

6. If the parties are unable to agree upon the following matters they have leave to exchange and lodge in the registry within 14 days of publication of these orders an outline of submissions not exceeding five pages concerning the appropriateness of order 4 and the appropriate form of orders 2 and 3.

[31] **MULLINS J:** I agree with Fraser JA.