

SUPREME COURT OF QUEENSLAND

CITATION: *BGM Projects Pty Ltd v Durmaz Corporation Pty Ltd* [2020] QSC 88

PARTIES: **BGM PROJECTS PTY LTD**
(Applicant)
v
DURMAZ CORPORATION PTY LTD
(Respondent)

FILE NO/S: BS No 5934 of 2019

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 24 April 2020

DELIVERED AT: Brisbane

HEARING DATE: 27 November 2019

JUDGE: Brown J

ORDER: **The Respondent pay the Applicant's costs of and incidental to the Application, including the appearances on 4 June 2019 and 27 November 2019, as agreed, and failing agreement, to be assessed on an indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – INDEMNITY COSTS – where an injunction was granted prohibiting the pouring of a concrete slab – where costs were reserved – where the respondent poured the concrete slab with the knowledge of the injunctive order – whether costs should be awarded on an indemnity basis

Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225, followed

COUNSEL: S Keim SC with R Quirk for the Applicant
The Second Respondent appeared on his own behalf and for the First Respondent

SOLICITORS: Clinton Mohr for the Applicant
The Second Respondent appeared on his own behalf and for the First Respondent

[1] BGM Projects Pty Ltd (**BGM**) seeks the costs of its application including costs reserved before Applegarth J on an indemnity basis on the basis it is entitled to final relief by way of removal of the shed in Brisbane Supreme Court File 12878/19.

- [2] In the judgement for the related proceeding 12878/19, I have set out the relevant background to this matter and made findings that the Building Covenants were binding upon Durmaz Corporation Pty Ltd (**Durmaz Corporation**). In that proceeding I have refused to order the removal of the concrete slab, the pouring of which gave rise to the injunctive relief granted by Applegarth J on 4 June 2019. At the time of that hearing, his Honour reserved the costs.
- [3] However, I am satisfied that the concrete slab was poured contrary to an undertaking given by Mr Durmaz on behalf of Durmaz Corporation on 28 May 2019 not to commence construction without approval of the building plans by BGM. The evidence establishes that Durmaz Corporation was bound by the Building Covenants and did not seek the consent of BGM to construct the shed. As such, Durmaz Corporation was in breach of the requirements of the Building Covenants after being informed by BGM's solicitors of its obligation to seek consent, and that the dimensions provided for the concrete slab did not comply with Clause 2.15 of the Building Covenants. The correspondence of BGM's solicitors placed the Respondents on notice that BGM would seek an injunction if Durmaz Corporation proceeded with construction works without BGM's approval and that BGM would seek indemnity costs prior to seeking the interim injunction. Durmaz Corporation has not taken any action to seek the removal of the Court's order of 4 June 2019 either on the basis of compliance with the Building Covenants or to contest BGM's entitlement to seek injunctive relief. I have found in proceeding 12878/19 that BGM was entitled to bring an application for such relief. It is appropriate that BGM have its costs of, and incidental to, the Application for an interim injunction before Applegarth J on 4 June 2019.
- [4] Consistent with the principles for awarding indemnity costs in *Colgate-Palmolive Co v Cussons Pty Ltd*¹ I am satisfied that it is appropriate to order that the costs of the application made on 4 June 2019 be paid by Durmaz Corporation on an indemnity basis given that I am satisfied that Durmaz Corporation, through Mr Durmaz, did pour the concrete slab notwithstanding:
- (a) that he had been advised that he was required to comply with the Building Covenants;

¹ (1993) 46 FCR 225.

- (b) that he was required to obtain approval of BGM for construction pursuant to clause 6 of the Building Covenants; and
- (c) that he had been advised through his solicitors that the shed did not comply with the dimensions specified in clause 2.15 of the Building Covenants; and
- (d) it had given an undertaking to first seek the approval of BGM for its plans as required by clause 6 of the Building Covenants and having been placed on notice that an injunction would be sought together with indemnity costs if he proceeded with construction works.

Order

[5] I order that the Respondent pay the Applicant's costs of and incidental to the Application, including the appearances on 4 June 2019 and 27 November 2019, as agreed, and failing agreement, to be assessed on an indemnity basis.