

# SUPREME COURT OF QUEENSLAND

CITATION: *BGM Projects Pty Ltd v Durmaz Corporation Pty Ltd* [2020] QSC 87

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

FILE NO/S: BS No 12878 of 2019

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 24 April 2020

DELIVERED AT: Brisbane

HEARING DATE: 27 November 2019

JUDGE: Brown J

ORDER: **1. The First Respondent, by its servants, agents or otherwise, cause all of the constructed shed, located on the real property situated at 94 Barramundi Drive, Burrum Heads, in the State of Queensland, more particularly described as Lot 132 on SP 207199 having title reference 50726640 (“Property”), being the structure identified on the Property in the affidavit of Mr Warren, to be removed within 45 days of the date of this order.**

**2. The First Respondent pay the Applicant’s costs of and incidental to the Application, as agreed, and failing agreement, to be assessed on an indemnity basis.**

CATCHWORDS: DEEDS – COVENANTS – RESTRICTIVE COVENANTS – GENERALLY – where the respondent purchased real property in an estate – where the respondent agreed to comply with restrictive covenants as part of the contract of sale – where the respondent began construction of a shed on the property in breach of the restrictive covenants – where an injunction was granted to prevent further construction – where the respondent continued construction in breach of the restrictive covenants and the injunction – where the applicant submits a mandatory injunction should be granted to demolish the shed constructed on the property – whether a mandatory injunction should be granted requiring the

respondent to demolish the shed constructed on the property

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – INDEMNITY COSTS – where an injunction was granted prohibiting construction on the Property – where the respondent constructed a shed without approval in breach of restrictive covenants and with the knowledge of the injunctive order and building covenants – where the respondent was put on notice that indemnity costs would be sought – whether costs should be awarded on an indemnity basis

*Corporations Act 2001* (Cth), s 127

*Property Law Act 1974* (Qld), s 44, s 46, s 47

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

*Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154, cited

*JC Williamson Ltd v Lukey & Mulholland* (1931) 45 CLR 282, cited

*Miller v Evans* [2010] WASC 127, followed

*Wakeham v Wood* (1982) 43 P&CR 40, considered

*Wily as Liquidator of Anglican Insurance Ltd* [2009] NSWSC 696, cited

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

## Introduction

- [1] BGM Projects Pty Ltd (**BGM**) is seeking relief of a final nature against Durmaz Corporation Pty Ltd (**Durmaz Corporation**) and Steve Durmaz (**Mr Durmaz**). BGM seeks mandatory injunctions to enforce certain Restrictive Covenants<sup>1</sup> against the Respondent, requiring them to remove a partially built shed and concrete slab that have been constructed on Lot 132, of Title Reference SP207199 in an estate known as “On the Beach” that is owned by Durmaz Corporation (the **Property**).<sup>2</sup> BGM also seeks an order that, in the event that the Respondents fail to remove the

<sup>1</sup> The restrictive covenants will be referred to as the “Building Covenants” hereinafter.

<sup>2</sup> The street address of the Property is 94 Barramundi Drive, Burrum Heads, in the state of Queensland, 4659.

shed and concrete slab, that the Respondents be restrained from interfering with BGM whilst they remove the shed and concrete slab. Costs are also sought on an indemnity basis, not only in relation to the present application, but in relation to an application for an interim injunction before Applegarth J where his Honour reserved the costs.<sup>3</sup>

- [2] Mr Durmaz attended court, and with leave, also appeared on behalf of Durmaz Corporation. At the outset of the hearing, Mr Durmaz stated that there was no real factual dispute as to the evidence of BGM. His real complaint was in relation to his solicitor who had appeared on his behalf before Bowskill J. None of his complaints have any bearing on the present application. In fact, the real complaint of Mr Durmaz is that he had bought Property in a community and signed conditions as part of his purchase obliging him to comply with Building Covenants.

#### **Contract of Sale and the Deeds**

- [3] BGM is the developer of “On the Beach” at Burrum Heads (the **Estate**). Durmaz Corporation purchased the Property, as trustee for the Alpagut Trust, from a Mr Smith under a contract dated 7 September 2018. The contract of sale included annexures that contained conditions whereby Durmaz Corporation agreed to be bound by certain Building Covenants (contained in Annexure A) in relation to the development of the Property, and further that it was to secure agreement to the Building Covenants from any subsequent purchasers, such that they will be bound by those covenants (Annexures C and D hereinafter referred to as the **Deeds**). The Deeds are said to be in favour of BGM. Both Deeds were executed on behalf of Durmaz Corporation by Mr Durmaz, who was the sole director and secretary of the Durmaz Corporation.
- [4] Special Condition 2 of the Contract of Sale between Mr Smith and the Durmaz Corporation stated:<sup>4</sup>

“(a) [Durmaz Corporation] acknowledges that every person that purchases land at On the Beach (of which the land being sold in this contract forms part) is required to comply with the Community Development Standards and Building Covenant Conditions.

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<sup>3</sup> Brisbane Supreme Court file 5934/19.

<sup>4</sup> Affidavit of Alexandra Leahy sworn 22 August 2019, filed on Court File 8760/19 at exhibit ALL4.

- (b) [Durmaz Corporation] agrees to sign the attached Continuation of Covenant and to be bound in all respects by the said covenants from the date of settlement.
- (c) [Durmaz Corporation] agrees to cause any person to whom he sells the [Property] to complete and sign a notification in these same terms and deliver it to BGM Projects Pty Ltd.”

[5] The Community Development Standards and Building Covenant Conditions, which form the Building Covenants in Annexure A, was signed by Mr Durmaz on behalf of Durmaz Corporation and states:

**“Introduction**

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. The Covenant defines the quality of the completed project, both environmentally and aesthetically.

...

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. Approval of Plans by Seller**

6.1 Prior to submissions to Council or any approved certifier for building approval and prior to commencement of construction of any improvements or the carrying out of any works on the land, plans and specifications including details of materials to be used for all proposed building work and operational works, complete in all respects (the plans) must be submitted using the Application form in Annexure “B” of the Sale Contract to BGM Projects for BGM Projects written approval.

...

BGM Projects may approve or refuse to approve or approve with amendment the plans at BGM Projects discretion providing that BGM Projects shall not act capriciously. The Buyer will not submit to the Council or any approved certifier the plans until such time as the Buyer has received BGM Projects approval in writing.” (bolding in original)

[6] Clause 13 of Annexure A provides that:

**“13. Continuation of Covenant**

13.1 The benefit of the covenants in this clause shall continue in full force and effect and remain binding on the Buyer, his executors, administrators, successors and assigns and that if the Buyer shall sell or assign or lease or otherwise part with

possession of the land hereby agreed to be sold to any other person then the Buyer will obtain from that other person a covenant in favour of BGM Projects agreeing to be bound by all of the terms of these building covenants upon delivery to BGM Projects of a binding covenant given by the subsequent buyer to BGM Projects and notification to BGM Projects in accordance with Annexure “C” in which the subsequent Buyer agrees to be bound by the building covenants herein...”

[7] Clause 14.1 of Annexure A provides that:

“The Buyer will sign a Buyers Acknowledgement in the form of Annexure “D” acknowledging the existence of the building covenants, agreeing to be bound by the building covenants and agreeing to pass those building covenants on to subsequent buyers.”

[8] Annexure A contains a series of conditions requiring houses to be built by the purchaser with particular materials and dimensions, restraints as to the order in which building can occur and specifications for buildings, including relevant to the present case, sheds.

[9] Annexure C provided for an acknowledgment by Durmaz Corporation to BGM that it would agree to comply with the Building Covenants in Annexure A. Annexure D then provided for the buyer, Durmaz Corporation in this case, to:<sup>5</sup>

- “1. acknowledge that, in order to ensure that a high standard of design and construction of dwelling houses is maintained at “On the Beach”, Burrum Heads, every person who purchases land at On the Beach is required to comply with the attached building covenants (“Covenants”); and
2. agree that if [they] purchased the land at On the Beach, [they] would comply with the Covenants and cause any person [they] sell the land to complete and sign a notification in these same terms and deliver to BGM Projects Pty Ltd.”

[10] The contract of sale, as well as, Annexures A, C and D were executed by Mr Durmaz on behalf of Durmaz Corporation in front of a witness who was not a party to the Deeds.

### **Background Facts**

[11] On 25 March 2019, BGM became aware that Durmaz Corporation had purchased the Property from Mr Smith. BGM became aware of Durmaz Corporation’s ownership after Mr Mitchell, the covenant manager at BGM, had sent photographs

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<sup>5</sup> Affidavit of Alexandra Leahy sworn 22 August 2019, filed on Court File 8760/19 at exhibit ALL4.

of the Respondents' proposed project sign erected on the property to Ms Leahy, BGMs Contract Administrator. BGM obtained copies of the contract of sale and Deeds on 23 May 2019.<sup>6</sup>

- [12] On 31 March 2019, Mr Durmaz had placed a caravan on the Property and had indicated to a Mr Buttriss that he intended on living in the caravan. Mr Buttriss confirmed with Mr Durmaz that he had signed Building Covenants, although the terms of the Building Covenants were not discussed at length. Mr Buttriss then informed Mr Durmaz that having a caravan on the Property was in breach of the Building Covenants signed by Mr Durmaz on behalf of Durmaz Corporation. Despite this, Mr Durmaz had stated that he would not remove his caravan from the Property.
- [13] On 1 April 2019, Mr Durmaz informed Ms Leahy, via telephone, that he intended to build any house he wanted to on the Property. He also stated that he did not intend to submit any building plans to BGM for approval, or to comply with the requirements of the Building Covenants.
- [14] On 12 April 2019, Mr Durmaz again spoke to Ms Leahy via telephone. During this conversation, he is said to have stated that he no longer intended to build on the Property and that he may transfer it to his grandchildren someday. Ms Leahy then reminded him of his obligation to secure agreement to the Deeds from any person to whom he transfers the Property.
- [15] On 22 May 2019, BGM became aware that Mr Durmaz had commenced construction works on the Property. Fraser Coast Regional Council informed BGM that a 9x10m<sup>2</sup> shed had been approved for the Property. No approval had been sought from BGM in relation to the shed. Ms Leahy contacted Mr Durmaz who told her that he was "doing whatever he wanted".<sup>7</sup> On 23 May 2019, BGM was contacted by a contractor who was to do work on the Property. That contractor informed BGM that they would cease all work on the Property.
- [16] BGM's solicitors and Durmaz Corporation's solicitors exchanged correspondence about the failure of Durmaz Corporation to obtain the requisite approval required

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<sup>6</sup> BGM initially received copies of the Contract of Sale and Deeds which were signed by Durmaz Corporation only. On 24 May 2019, BGM received the fully executed Contract of Sale and Deeds.

<sup>7</sup> Affidavit of Alexandra Leahy sworn 22 August 2019, filed on Court File 8760/19 at [18]-[20].

under the Building Covenants and BGM's solicitors sought undertakings from Durmaz Corporation.

[17] On 28 May 2019, Mr Durmaz gave an undertaking, in favour of BGM, that they:<sup>8</sup>

“...undertake in writing to comply with the building covenants and submit, plans of any improvements you propose to construct on the Property before seeking to obtaining [sic] any Council or certification approval to those improvement or commencing construction of them on the Property.”

[18] BGM had first requested Mr Durmaz give an undertaking in the above terms on 3 April 2019, and pressed Mr Durmaz to provide such an undertaking until it was provided on 28 May 2019.<sup>9</sup>

[19] On 31 May 2019, BGM was informed by a resident that the Respondents had sought to commence construction works on the Property through a different contractor, but that these did not commence once the contractor had been informed that Court proceedings had commenced in relation to the Property.

[20] Subsequently, Mr Durmaz caused a concrete slab to be poured on the Property without approval and an urgent injunction was sought by BGM. On 4 June 2019, Applegarth J granted an interlocutory injunction restraining the Respondent from undertaking any further construction work on the Property in breach of the Building Covenants without the requisite approval. At the time, the transcript shows that the Respondent did not challenge the validity of the Building Covenants. His Honour explained the effect of the Orders made to Mr Durmaz.

[21] Order 1 and 3 of the Orders made by his Honour provided that:

“1. Until further order that the Respondent by its servants, agents or otherwise be restrained from undertaking, or directing a person to undertake, construction works including any pouring of concrete, excavation or landscaping on real property situated at 94 Barramundi Drive, Burrum Heads in the state of Queensland, more properly described as Lot 132 on SP 207199 having title reference 50726640.

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<sup>8</sup> Affidavit of Clinton Mohr sworn 4 June 2019, filed on Court File 5934/19 at exhibit CMM-16.

<sup>9</sup> See affidavit of Clinton Mohr sworn 4 June 2019, filed on Court File 5934/19 at exhibits CMM-10, CMM-11 & CMM-16.

3. If the Respondent wishes to apply to set aside or vary the order made in paragraph 1, then any application shall be made upon the giving of 7 days' notice in writing and the serving of any affidavit material upon which it intends to rely at least 5 days prior to the date for the hearing of the application."

[22] On 6 June 2019, Mr Durmaz sent an email to BGM, in which he had requested approval to build a shed on the Property due to his financial circumstances at that date. It should be noted that Mr Durmaz did not provide any building plans for the proposed shed at this stage. Instead, Mr Durmaz stated "...I believe a lawyer who was acting on your company's behalf already [sic] has the plans for the shed that I'm proposing to erect on my property..."<sup>10</sup> BGM's solicitors responded rejecting that was the case. In subsequent correspondence, Mr Durmaz was informed that the shed dimensions which he proposed did not comply with clause 2.15 of the Building Covenants.

[23] On 19 June 2019, Durmaz Corporation, through its solicitors, lodged an application for approval of building plans. Those plans included provision for a garage in similar size and position as the shed that was sought to be constructed by the Respondents. On 1 July 2019, BGM rejected the assertion by the Respondents' solicitors that the plans complied with the Building Covenants and stated that clause 2.24 of the Building Covenants did not permit construction of the garage prior to the construction of the residential dwelling. Further plans were submitted that were given conditional approval by BGM. However, BGM would not agree to varying the Orders of Applegarth J to permit construction to proceed without undertakings being given to the Court.

[24] On 9 August 2019, Mr Durmaz informed BGM that he no longer owned the Property. At this time, Durmaz Corporation had sought to transfer the Property to Mr Durmaz's brother, Sean Durmaz, without requiring Sean Durmaz to sign the Deeds which Durmaz Corporation was obliged to procure from any purchaser. The transfer had not been registered with the Titles Office. As a result of that action, a further injunction was obtained from this Court to prevent the transfer from being registered. Orders were subsequently made by consent by Bowskill J on 28 August 2019. Durmaz Corporation was ordered to pay indemnity costs.

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<sup>10</sup> Affidavit of Alexandra Leahy sworn 22 August 2019, filed on Court File 8760/19 at exhibit ALL9.

- [25] Subsequent to that, on 18 September 2019, Mr Durmaz sent an email to Ms Leahy and contended that the Deeds were illegal. On or about 22 October 2019, Mr Durmaz caused Durmaz Corporation to proceed to construct a structure, which was accepted by all parties to be a shed on the Property, notwithstanding the injunction of Applegarth J.
- [26] On 27 October 2019, the Respondents were sent correspondence by BGM's lawyer informing them that they should cease works and were in breach of the Building Covenants and the order of Applegarth J. Mr Durmaz sent emails in response alleging the Deeds were illegal given a number of other owners had allegedly not signed similar Deeds. He further alleged that misrepresentations have been made by BGM in relation to the Deeds. On 28 and 31 October 2019, BGM's solicitor responded to each of the assertions made by Mr Durmaz and requested that he remove all works that had been constructed on the Property. On 5 November 2019, Mr Durmaz attended BGM's offices where he tried to speak to Mr Murphy. During that conversation Mr Durmaz indicated that he was going to live in the shed.

#### **Submissions of the Parties**

- [27] BGM seeks to enforce the terms of the Building Covenants, even though it was not a party to the Contract of Sale, relying on the execution by Durmaz Corporation of the Deeds. BGM submits that it has not granted any approvals under the Building Covenants for the construction of the shed and has stated that the shed would not be approved because of its size.<sup>11</sup> BGM has also stated that the shed would not be able to be constructed in advance of a dwelling in any event due to clause 2.24 of the Building Covenants.<sup>12</sup> BGM contends that the repeated and deliberate acts of breach by Durmaz Corporation, through Mr Durmaz, support the granting of mandatory injunctions.
- [28] The Respondents do not challenge the fact that a shed has been constructed on the Property without the approval of BGM, notwithstanding the terms of the Building Covenants and in breach of the terms of the injunction imposed by Applegarth J on 4 June 2019.

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<sup>11</sup> Affidavit of Clinton Mohr sworn 12 August 2019, filed on Court File 8760/19 at exhibits CMM-4, CMM-5 & CMM-6. C/f CMM-32 where approval was given of the garage which was incorporated in the plans for the dwelling subject to undertaking that various conditions would be met.

<sup>12</sup> Affidavit of Clinton Mohr sworn 12 August 2019, filed on Court File 8760/19 at [36] and exhibit CMM-32.

[29] Mr Durmaz, who appeared on behalf of both of the Respondents, did not offer any defence nor arguments against the granting of the mandatory injunction, save that he raised the fact that there were people on the estate that had not signed contracts containing the same Building Covenants. Notwithstanding that he had been served with the material, had notice of the application and had some familiarity with the litigation process, he presented no evidence to that effect before the Court. While the absence of each resident signing Building Covenants in the same terms as the Respondents would potentially reduce the protection of the amenity and value of the Estate, the mere fact that other residents have not signed such covenants does not result in the Respondents not being bound by the Building Covenants. It is uncontested that Mr Durmaz, on behalf of Durmaz Corporation, signed the relevant Deeds to be bound by the Building Covenants.

***Entitlement under the Deeds***

[30] BGM submits that there are two grounds upon which they are entitled to the relief sought. Firstly, BGM contends that the Deeds are enforceable on the basis that BGM was named in the Deeds. Secondly, and in the alternative, BGM contend that, pursuant to s 55 of the *Property Law Act 1974 (Qld) (PLA)*, Special Condition 2 of the contract of sale was enforceable on the basis that Durmaz Corporation agreed to be bound by it, and that the condition was for the benefit of BGM.

[31] BGM contends that the Deeds are documents described as deeds, executed in a way authorised by statute and delivered. The requirements for a document to constitute a deed is affected by ss 44, 46 and 47 of the *PLA*. The Annexures are described as deeds in the respective execution clauses,<sup>13</sup> namely that they were “signed as a deed this 5th day of September 2018”. There is no doubt that they meet the description of deeds. It is contended by BGM that it is sufficient for the Deeds to have been executed by Mr Durmaz as the sole director and company secretary of Durmaz Corporation, even though they have not been executed using the company seal. Pursuant to ss 127(1)(c) and 127(3) of the *Corporations Act 2001 (Cth)*, a person who is the sole director and company secretary may execute a deed if the document is expressed to be executed as a deed without using a common seal.<sup>14</sup> I am satisfied

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<sup>13</sup> Satisfying *PLA* s 44.

<sup>14</sup> Which accords with *PLA* s 46(6).

that the Annexures referred to as the Deeds were executed by Mr Durmaz on behalf of Durmaz Corporation as deeds.

- [32] It is also contended by BGM that the Deeds have been delivered. Delivery means the intention to be legally bound either immediately or subject to fulfilment of a condition.<sup>15</sup> Delivery is not presumed from the fact of execution, unless it appears that execution of the document was intended to constitute delivery of the document.<sup>16</sup> Section 47(2) of the *PLA* provides that delivery may be inferred from any fact or circumstance including words or conduct indicative of delivery.
- [33] BGM contends that delivery should be inferred from the fact that the deeds were executed on behalf of Durmaz Corporation and returned to Mr Smith to fulfil his obligations to comply with the Building Covenants.
- [34] The Contract of Sale and Deeds were signed by Mr Smith, as the seller, and Mr Durmaz on behalf of Durmaz Corporation, as the buyer. They were returned to the vendor who ultimately provided them to BGM. The Deeds have not been signed by BGM. In the circumstances, I infer from the conduct of returning the executed Deeds to the vendor, that it was intended that Durmaz Corporation was to be immediately bound by the Deeds. I am satisfied that the Deeds were delivered.
- [35] As stated above, BGM was not a party to the Contract of Sale. The Deeds are however said to be for the benefit of BGM, as they have been named in the Deeds, such that they have standing to sue on them.<sup>17</sup> In the Annexure C Deed, the deed is addressed to “BGM”. In the Annexure D Deed, BGM is named in clause 2. BGM contends that that it is sufficient for it to be able to enforce the terms of the Deeds.
- [36] In *Wily as Liquidator of Anglican Insurance Ltd* Barrett J noted that “An entitlement may be claimed under a deed poll by a person within the relevant class only upon satisfaction of any condition that the deed attaches to the entitlement.”<sup>18</sup>
- [37] In the present case, no condition was attached to the entitlement of BGM to enforce the Building Covenants. It was clear that BGM was to benefit from the terms of the

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<sup>15</sup> *PLA* s 47(3).

<sup>16</sup> *PLA* s 47(1).

<sup>17</sup> *Wily as Liquidator of Anglican Insurance Ltd* [2009] NSWSC 696 at [7].

<sup>18</sup> At [7].

Deeds, both from the terms of the Deeds themselves but also Clauses 7 and 13 of the Building Covenants and that it is “within the relevant class”.

- [38] I am satisfied that BGM can claim an entitlement under the Deeds such that it can enforce the terms of the Deeds against Durmaz Corporation to comply with the terms of the Deeds, particularly the Building Covenants. Given that finding, I do not need to make a finding as to whether BGM has the benefit of an enforceable promise pursuant to s 55 of the *PLA* and I will not consider that matter further.

***Compliance with the terms of the Deed***

- [39] There is no doubt in the present case that Durmaz Corporation was aware of the Building Covenants. Correspondence has been exchanged between Durmaz Corporation’s lawyers and BGM’s lawyers in April and May, by which Durmaz Corporation was informed of the need to comply with the Building Covenants and obtain approval for plans of construction under clause 6 of the Building Covenants. Durmaz Corporation had obtained Council approval but not the approval of BGM. Notwithstanding the undertaking given by Mr Durmaz to comply with the Building Covenants and submit the plans of improvements he proposed to construct before commencing construction, such as the pouring of the concrete slab, he proceeded to do so, which resulted in the application for an injunction on 4 June 2019.

- [40] In the hearing before Applegarth J, Mr Durmaz acknowledged advice of the validity of the Building Covenants.<sup>19</sup> At the time Mr Durmaz appeared before his Honour, the concrete slab had been laid and he informed his Honour that it was another month before the shed was to arrive. His Honour informed Mr Durmaz that he could try and sort the matter out by seeking consent as required under the Building Covenants and further stated that:<sup>20</sup>

“If they don’t give you their consent, then you get other advice. But for the moment on the material before me, there’s no reason to doubt the validity of the covenant that you haven’t contained (sic) consent, you’re in breach of it.”

- [41] Applegarth J carefully explained the effect of the order to Mr Durmaz in the hearing of 4 June 2019, namely that it restrained Durmaz Corporation and Mr Durmaz,

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<sup>19</sup> Transcript of Proceedings, 4 June 2019 at 1-4/40-44 and 1-5/14-20.

<sup>20</sup> Transcript of Proceedings, 4 June 2019 at 1-12/32-34.

either himself or through a builder, from doing any construction works on the Property until the Court made a different order.<sup>21</sup>

[42] While Mr Durmaz engaged lawyers, caused building plans to be drawn and subsequently sought consent from BGM after 4 June 2019, it was refused. He sought permission to construct the shed prior to the dwelling so that he could live in it until he had sufficient money to construct the dwelling. That was refused on the basis he was obliged to build the dwelling first under the Building Covenants, particularly clause 2.24. He had been informed previously, including through correspondence with his lawyers, that a shed of the dimensions proposed to be constructed on the concrete slab was larger than provided for under clause 2.15 of the Building Covenants, which is borne out by the plans provided and affidavit evidence presented. When further plans were submitted to BGM in early August, whereby the concrete slab was being used to construct a garage as part of the residential dwelling, Durmaz Corporation's lawyers stated their client's intention to seek to vary the Orders of Applegarth J on 4 June 2019. BGM had provided conditional approval at that time but undertakings were sought by BGM in order for the injunction on construction to be lifted.<sup>22</sup> Durmaz Corporation refused to give the undertakings and no application was made to the Court to lift or vary the injunction.

[43] Durmaz Corporation instead sought to transfer the Property to his brother without securing signed Deeds from him as required under the terms of the Annexure C Deed, as a result of which, a further injunction was granted on 28 August 2019.<sup>23</sup>

[44] In the hearing of this application, Mr Durmaz accepted that he had constructed the shed and did so notwithstanding that he was aware of the injunctive order of Applegarth J. The affidavit evidence also supports the fact he had made admissions he was proceeding to construct the shed knowing that he did not have permission to do so under the Building Covenants and that it was in contravention of the terms of the injunction of 4 June 2019.

### **Should Mandatory Injunctions be granted?**

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<sup>21</sup> Transcript of Proceedings, 4 June 2019 at 1-16/36-47.

<sup>22</sup> Affidavit of Clinton Mohr sworn 12 August 2019, filed on Court File 8760/19 at exhibit CMM-32.

<sup>23</sup> Brisbane Supreme Court file 8760/19.

[45] BGM has issued separate proceedings seeking a mandatory injunction for Durmaz Corporation to remove the shed and concrete slab rather than bringing proceedings for contempt of his Honour's order of 4 June 2019, or permanent relief in that proceeding. No compelling reason was provided to me as to why that course was not followed, save that further costs orders were also sought in proceedings. The relief sought in the Originating Application before Applegarth J could have been amended to include relief in the nature that was sought before the Court in the present Originating Application. BGM could then have sought to have the costs argument in relation to the application before Applegarth J heard at the same time. To issue fresh proceedings unnecessarily increases the costs of the whole proceeding.

[46] BGM seeks mandatory injunctions, insofar as it seeks orders for the removal of the shed and concrete slab, by Durmaz Corporation, or failing its compliance, by BGM. The relief sought is in the nature of final relief. The Court can hear such applications in the Applications jurisdiction where there is no factual dispute between the parties. That is presently the case, given Mr Durmaz's indication that there was no factual dispute.

[47] According to Dixon J in *JC Williamson Ltd v Lukey & Mulholland*:<sup>24</sup>

“ ...

If, however, a clear legal duty is imposed by contract to refrain from some act, then prima facie, an injunction should go to restrain the doing of that act. It appears of little importance now whether the duty is imposed by a terms of the contract expressed in negative or affirmative language. ...”

[48] In *Miller v Evans*,<sup>25</sup> Hall J conveniently summarised the principles in relation to the exercise of the Court's discretion where a mandatory injunction is sought in the context of an injunction being sought to enforce Building Covenants. Relevantly his Honour stated that:<sup>26</sup>

**“Principles relating to a mandatory injunction**

[24] The basis for an application for a mandatory injunction is that if the plaintiff had taken proceedings at an earlier stage she

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<sup>24</sup> (1931) 45 CLR 282 at 299-300.

<sup>25</sup> [2010] WASC 127 which was upheld on appeal *Evans v Miller* [2011] WASCA 89.

<sup>26</sup> At [24]-[29].

would have obtained an injunction restraining the defendants from committing the acts in question. However, the imposition of a positive requirement may be more likely to give rise to hardship or disproportionate expense on the part of the defendant. Factors of this type may influence the court against exercising the equitable jurisdiction to enforce a restrictive covenant or to confine the plaintiff to equitable damages in lieu of an injunction. The basic concept is that of producing a fair result and this involves the exercise of a judicial discretion.

- [25] Factors relevant to the exercise of the court's discretion include the extent of the defendants' knowledge of the wrongful nature of his or her acts. In *Jaggard v Sawyer* (1995) 2 All ER 189 Millett LJ said:

“At one extreme the defendant may have acted openly and in good faith and in ignorance of the plaintiff's rights and thereby inadvertently placed himself in a position where the grant of an injunction would either force him to yield to the plaintiff's extortion and demands or expose him to substantial loss. At the other extreme the defendant may have acted with his eyes open and in full knowledge that he was invading the plaintiff's rights and hurried on his work in the hope that by presenting the court with a fait accompli he could compel the plaintiff to accept monetary compensation. Most cases like the present fall somewhere in between.”

- [26] The hardship that will be caused to the plaintiff by the refusal of an injunction has to be weighed against the hardship that would be caused to the defendant by the grant of an injunction. In this regard the court must consider the extent to which the injuries suffered by the plaintiff are compensable by an award for damages. However, the normal remedy for a threatened or actual breach of a restrictive covenant is an injunction and the court's power to award damages in lieu of an injunction is discretionary and should be exercised with caution. Damages may be a sufficient remedy only if the injury to the plaintiff's legal rights is small, is capable of being estimated in money terms, can be adequately compensated by a small money payment and it would be otherwise oppressive to the defendant to grant an injunction.
- [27] Whilst the occasioning of hardship to the defendant is a relevant consideration in the exercise of the discretion to grant an injunction, the mere fact of hardship is not itself sufficient. Hardship will usually only justify refusal of a mandatory injunction if the hardship that would be inflicted on the defendant is disproportionate to the benefit to the plaintiff.
- [28] In *Wakeham v Wood* (1982) 43 P&CR 40 consideration was given to the difficulties in quantifying the damage where the

restrictive covenant breached is one that protects views. In that case Waller LJ said:

“The authorities show that in the case of express negative covenants, that is where an agreement has been made and a particular thing is not to be done, an injunction will be granted to restrain a breach. And where a defendant commits a breach of a negative covenant with his eyes open and after notice the court will grant a mandatory order, although there must be some limitation to this practice: eg see per Astbury J and *Sharp v Harrison* and in that case the Judge found reasons for awarding damages.

...

The present case does not in my view qualify in any particular with paragraphs 1 to 4 mentioned by AL Smith LJ. Here is a man who had been living in his house for 33 years with a view of the sea protected by restrictive covenant. The defendant purchased the land subject to the restriction with knowledge of it at the time of purchase. He did not make any enquiry of the plaintiff either directly or indirectly, he did not inform his architect of the restriction, he took no notice of his builder telling him of the plaintiff's objection and he put the roof trusses up in spite of letters from the plaintiff's solicitor. A more flagrant disregard of the plaintiff's rights is difficult to imagine. As I have already indicated the Judge concluded that there was a serious interference with the plaintiff's legal right to a view of the sea. I find it difficult to say that where one has a view protected by covenant the denial of that view is capable of being estimated in money terms and therefore it seems to me it cannot be adequately compensated by a small money payment. Indeed in this case the judge awarded a substantial money payment. *It no doubt would be oppressive to the defendant if a mandatory injunction is granted against him but that is entirely his own fault for proceeding with the construction in breach of the covenant after warning.*” (emphasis added)

[29] There is another consideration which will constrain the award of damages in lieu of an injunction. If a court grants damages it in effect licenses the defendant's unlawful act for the future, subject to the payment of compensation to the plaintiff. ...” (citations omitted)

[49] It is not necessary for a plaintiff seeking to restrain a breach of a Building Covenant to have to show that the activities of the defendant will reduce the value of the

benefited land. The majority in *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* stated that:<sup>27</sup>

“...the absence of proof of substantial damage is not by itself sufficient to deny injunctive relief and, in exercising its discretion, a court of equity is bound to consider all the circumstances of the case. In particular, the negative character of the covenant assists the case for its enforcement by injunction, even where the parties to the suit are not those bound at law as the original covenantor and covenantee.”

[50] In the present case, I am satisfied that the evidence supports the fact that the actions of Mr Durmaz, as the sole director of Durmaz Corporation, in constructing the shed, has caused Durmaz Corporation to breach the Building Covenants that Durmaz Corporation was bound to comply with under the Deeds. The breach resulted from not having approval to construct the shed, and constructing a shed before the construction of a residential dwelling, and where the dimensions of the shed did not comply with the Building Covenants in any event. Numerous letters had been sent to Mr Durmaz putting him on notice that he was bound to comply with the terms of the Building Covenants, the acts which constituted a breach of the Building Covenants and that injunctive relief with indemnity costs would be sought if he did not cease to act in breach of the Building Covenants.

[51] While there is no doubt Mr Durmaz found compliance with the Building Covenants oppressive, he flagrantly breached the requirements of the Building Covenants and acted in disregard of the Court’s Order of 4 June 2019. The comments of Waller LJ in *Wakeham v Wood*, referred to by Hall J in *Miller v Evans* are of particular relevance to the present circumstances. Mr Durmaz signed the Deeds which obliged Durmaz Corporation to comply with the Building Covenants. He was intending to build the shed on the Property after the pouring of a concrete slab, which was subsequently restrained by the Order of 4 June 2019. After not receiving approval to build the shed following considerable correspondence being exchanged between his solicitors and BGMs solicitors, and subsequently between Mr Durmaz and BGM’s solicitors, Durmaz Corporation proceeded to build the shed on the concrete slab notwithstanding it knew of the Court’s order of 4 June 2019 restraining such construction. Durmaz Corporation did not seek the lifting or variation of the Order of 4 June 2019 and proceeded to build the shed contrary to the terms of the Court’s

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<sup>27</sup> (1998) 193 CLR 154 at [18].

order, without BGM's consent and contrary to clauses 2.15 and 2.24 of the Building Covenants, the latter of which provided "no erection of other buildings prior to the construction of the dwelling".

- [52] Durmaz Corporation proceeded with its eyes open and on notice that BGM would take further legal action against it to restrain the breach, including the seeking of orders for the removal of the shed and indemnity costs.<sup>28</sup> It knew of the wrongful nature of his acts in constructing the shed but proceeded to do so notwithstanding that knowledge. While the demolition of the shed will be a cost to Durmaz Corporation, there is no evidence that it will suffer significant hardship as a result of the grant of the mandatory injunction.
- [53] The Building Covenants ensure not only that BGM maintains the standard of its developments and value of its unsold land, but also ensuring that all other purchasers who bought property in the Estate, and were bound to comply with the restrictions and requirements contained in the Building Covenants, have the benefit of the houses being built to minimum standards to maintain the value and attraction of the Estate.<sup>29</sup> Given the nature of the Estate, which provides for the purchasers to maintain certain building standards by the imposition of Building Covenants, and the evidence that the shed does not comply with the Building Covenants, I find that damages are not an adequate remedy. That is so even aside from the fact that Durmaz Corporation was bound to construct the dwelling first.
- [54] Durmaz Corporation offered no defence or ameliorating circumstances in relation to the breaches of the Building Covenants. Mr Durmaz contended, in correspondence and before the Court, that all owners had not signed the Deeds and therefore the Covenants were illegal. He further contended that BGM had engaged in misleading conduct. No evidence however was presented to the Court supporting those allegations nor an adjournment sought to do so. In any event, it is clear that Durmaz Corporation had signed the Deeds and agreed to be bound to the Building Covenants in Annexure A.

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<sup>28</sup> For example, see the affidavit of Clinton Mohr sworn 12 August 2019, filed on Court File 8760/19 at exhibit CMM-32.

<sup>29</sup> Affidavit of Philip Murphy sworn 22 August 2019, filed on Court File 8760/19 at [12]-[14] where Mr Murphy explains the purpose of the Building Covenants.

- [55] I do not consider that any hardship suffered by Durmaz Corporation by the grant of the mandatory injunction requiring demolition of the shed outweighs the hardship suffered by BGM in refusing the injunction. Nor has BGM engaged in any disqualifying conduct which would weigh against the Court granting such relief. BGM has acted diligently and without delay in enforcing the Building Covenants. The correspondence BGM's solicitors sent to Durmaz Corporation and its solicitors set out, in detail, the provisions of the Building Covenants and the non-compliance with those requirements and put Durmaz Corporation on clear notice that, if it proceeded to act in breach of the Building Covenants, the present proceedings would be brought.
- [56] I consider that when one balances all the relevant factors, particularly having regard to the flagrant breaches by Durmaz Corporation of the Building Covenants, the Order of this Court of 4 June 2019 and the fact that the shed exceeds the dimensions which are provided for under clause 2.15 of the Building Covenants, that this is one of the cases where it is appropriate for the Court to exercise its discretion in favour of granting a mandatory injunction requiring the Respondents to remove the shed.
- [57] However, the same conclusion does not apply to the concrete slab. Notwithstanding that it was poured in disregard of the requirements for approval under the Building Covenants and is the foundation of the shed.
- [58] Unlike the shed, which cannot comply with clause 2.15 of the Building Covenants given its dimensions, the concrete slab may be able to form part of the foundation of any future residential dwelling on the Property. It is apparent that it can lawfully be incorporated in the construction of the dwelling proposed by the Respondents and comply with the Building Covenants, given that the plans were approved on the basis that the minimum floor area, including the double car garage, must not be less than 200m<sup>2</sup> as required by clause 4.1.1.<sup>30</sup>
- [59] I am therefore not satisfied that the concrete slab cannot be used for future construction that is compliant with the Building Covenants if Durmaz Corporation obtains the relevant approval from BGM, even though it cannot be used for a shed.

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<sup>30</sup> Affidavit of Clinton Mohr sworn 12 August 2019, filed on Court File 8760/19 at exhibit CMM-32.

- [60] The shed does stand out in the landscape. However, the concrete slab is not intrusive and cannot be regarded as affecting the attractiveness or value of the Estate in a significant way. Any diminishment in the value of the estate could be adequately met by damages.
- [61] Even though Durmaz Corporation laid the concrete slab without the consent of BGM and was on notice that consent was required, I consider that ordering its removal would cost undue hardship to Durmaz Corporation. Any hardship caused to BGM would be outweighed by that fact that the concrete slab is on Durmaz Corporation's Property and there is some prospect it could be lawfully incorporated in the plans for a residential dwelling in the future. I am not persuaded that it can never comply with the Building Covenants even if it cannot comply as a shed.<sup>31</sup> I should emphasise that that does not mean BGM is placed in a position where it must provide consent. Durmaz Corporation is restrained from carrying out any further construction work until a further order by the Court, pursuant to the Order of 4 June 2019. Provision is made in paragraph 3 of that Order for Durmaz Corporation to seek to vary or set aside that Order.
- [62] I therefore am not persuaded that I should extend the mandatory injunction to provide for the removal of the concrete slab on the Property.

### **Orders to be made**

- [63] I will make an order in terms of paragraph 1 of the proposed order but removing the words "including the poured concrete slab". The words "or similar structure" should also be removed from the proposed Order as it is clear that it is the structure that is referred to as the shed, which is the only structure on the Property that is to be demolished.
- [64] I am not satisfied in the present circumstances, with the restrictions of COVID-19, that 14 days is a reasonable time to remove the shed. I will provide the Respondents a period of 45 days from the date of the Order of the Court.
- [65] I am not satisfied that it is appropriate to permit BGM to demolish the shed in the event that Durmaz Corporation do not do so, as sought in paragraphs 2 and 3.

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<sup>31</sup> Affidavit of Clinton Mohr sworn 4 June 2019, filed on Court File 8760/19 at exhibit CMM-25 which referred to the shed not complying with the Building Covenants; Annexure A at cl 2.15.

Provision is made in paragraph 1 for Durmaz Corporation to be in contempt if it does not comply with the Order within the specified time. I appreciate that this matter has resulted in considerable time being spent and costs being incurred by BGM and that Durmaz Corporation has made several attempts to circumvent the requirements of the Building Covenants. However, I am not satisfied that it is appropriate for this Court to provide BGM with the benefit of a self-executing order in the event that the Respondents do not comply with the Court's order to remove the shed, although that may not be the case if the shed is not demolished in accordance with the Court's order.<sup>32</sup> The proposed Order specifically provides that Durmaz Corporation will be in contempt of the Order if it does not comply with the Order and demolish the shed. Non-compliance with a court order is a serious matter, and if Durmaz Corporation does not comply with the order, actions to enforce the order will have to be taken. That will result in the Respondents inevitably being liable for further costs and to be in contempt of a court order.

### **Costs**

- [66] BGM seeks the costs of the present application on an indemnity basis.
- [67] Although BGM has not been successful in obtaining all of the orders that it sought by way of relief, it has been substantially successful and should be paid its costs of the application. Although I raised the fact that the present proceeding could have been brought as part of proceeding number 5934/19, taking that course of action would have still required the incurring of costs by way of seeking amendments to the Originating Application to enable it to seek such relief. In the circumstances, I do not propose to reduce the costs awarded by the amount of the filing fee.
- [68] As to whether the costs should be paid on an indemnity basis, BGM relies on clause 7.2 of the Building Covenants and the principles as to awarding indemnity costs discussed in *Colgate-Palmolive Co v Cussons Pty Ltd*.<sup>33</sup>
- [69] Clause 7.2 of the Building Covenants requires Durmaz Corporation to pay BGM "all costs incurred" in enforcing the Building Covenants on a "full indemnity basis". It is clear that the covenant for costs is broad in its terms, requiring the payment of costs on a "special basis" (namely an indemnity basis) in a particular circumstances

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<sup>32</sup> Notwithstanding clause 7.2 of the Building Covenants.

<sup>33</sup> (1993) 46 FCR 225.

(namely the enforcement of Building Covenants) and is one for the benefit of BGM, who is responsible for enforcing the Building Covenants. The validity of that covenant has not been challenged. The Court's discretion is ordinarily exercised in accordance with such a covenant.<sup>34</sup>

[70] Costs are also sought in the alternative, on the basis of the principles in *Colgate-Palmolive Co v Cussons Pty Ltd*<sup>35</sup> given Durmaz Corporation proceeded to erect the structure for a shed on the concrete slab in defiance of the Order of this Court dated 4 June 2019. I am satisfied that Durmaz Corporation did so notwithstanding it was aware of the terms of the 4 June 2019 Order.

[71] The erection of the shed was a flagrant breach of the Building Covenants and the Court Order of 4 June 2019. In the circumstances, an indemnity costs order against Durmaz Corporation is therefore appropriate, either on the basis of clause 7.2 of the Building Covenants or the principles for awarding indemnity costs set out in *Colgate-Palmolive Co v Cussons Pty Ltd*.<sup>36</sup>

[72] I will therefore order that Durmaz Corporation pay the costs of BGM Projects of and incidental to this Application on an indemnity basis.

### Orders

[73] I will make the order in terms of paragraphs 1 and 5 of the proposed order, including the amendments stated above, and with the notice that Durmaz Corporation will be liable to court proceedings and punishment for contempt if the order is not complied with.

[74] I order:

1. The First Respondent, by its servants, agents or otherwise, cause all of the constructed shed, located on the real property situated at 94 Barramundi Drive, Burrum Heads, in the State of Queensland, more particularly described as Lot 132 on SP 207199 having title reference 50726640 ("**Property**"), being the structure identified on the Property in the affidavit of Mr Warren, to be removed within 45 days of the date of this order.

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<sup>34</sup> *Deputy Commissioner of Taxations v Bourke* [2018] VSC 113 at [61].

<sup>35</sup> (1993) 46 FCR 225.

<sup>36</sup> (1993) 46 FCR 225.

2. The First Respondent pay the Applicant's costs of and incidental to the Application, as agreed, and failing agreement, to be assessed on an indemnity basis.