SUPREME COURT OF QUEENSLAND

CITATION:	*BGM Projects Pty Ltd v Durmaz* [2020] QCA 146
PARTIES:	**BGM PROJECTS PTY LTD** ACN 102 165 328 (respondent/applicant) **v** **STEVE DURMAZ** (appellant/respondent)
FILE NO/S:	Appeal No 5552 of 2020 SC No 12878 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 87 (Brown J)
DELIVERED ON:	30 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2020
JUDGES:	Morrison JA
ORDERS:	**1. The notice of appeal is struck out.** **2. The appellant pay the respondent's costs of and incidental to the application on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – OTHER MATTERS – STRIKE OUT – where the respondent/applicant has applied to strike out the notice of appeal – where in the alternative the respondent/applicant seeks an order for security for costs – where Durmaz Corporation purchased a lot in the respondent/applicant's development – where the contract of sale included a series of covenants governing the design and construction of dwellings on the lot – where Annexures C and D to the contract of sale were Deeds in favour of the respondent/applicant, executed on behalf of Durmaz Corporation by the appellant/respondent – where the appellant/respondent caused Durmaz Corporation to construct a non-approved shed on the lot – where there was no challenge to the fact that the shed had been constructed without approval from BGM, in breach of the building covenants, and in breach of the order of Applegarth J made on 4 June 2019 – where Brown J found that it was clear that Durmaz Corporation had signed the Deeds and agreed to be bound by the building covenants – where the order against

which the appeal has been brought was that of Brown J – where the order was that Durmaz Corporation Pty Ltd cause a constructed shed on real property to be removed, and pay costs on an indemnity basis – whether the notice of appeal should be struck out

Uniform Civil Procedure Rules 1999 (Qld), r 371(2)

BGM Projects Pty Ltd v Durmaz Corporation Pty Ltd [2020] QSC 87, cited
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Re Cameron [1996] 2 Qd R 218; [1996] QCA 37, cited
Robertson v Hollings & Ors [2009] QCA 303, cited
von Risefer v Permanent Trustee Co Pty Ltd [2005] 1 Qd R 681; [2005] QCA 109, cited

COUNSEL: R A Quirk for the respondent/applicant
The appellant/respondent appeared on his own behalf

SOLICITORS: Clinton Mohr Lawyers for the respondent/applicant
The appellant/respondent appeared on his own behalf

[1] **MORRISON JA:** The respondent has applied to strike out the notice of appeal in this matter: (i) pursuant to the inherent jurisdiction of the Court on the basis that it is frivolous, vexatious or an abuse of process; or (ii) pursuant to r 371(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) as it does not state briefly and specifically the grounds of appeal.

[2] In the alternative the respondent seeks an order for security for costs in the sum of $24,568.70.

[3] The order against which the appeal has been brought was that of Brown J, delivered on 24 April 2020.[1] That order was that Durmaz Corporation Pty Ltd: (a) cause a constructed shed on real property at Burrum Heads to be removed; and (b) pay costs on an indemnity basis.

Background matters

[4] A short recitation of the history of this matter assists in understanding the issues on the current application.

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

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

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1 *BGM Projects Pty Ltd v Durmaz Corporation Pty Ltd* [2020] QSC 87.

> Many items will reflect the design requirements of the Fraser Coast Regional Council, whilst others reflect the 'liveability' vision of the completed project and are a natural product of the unique beachfront and lakeside topography.
>
> Buyers may take comfort in the knowledge that their investment is not devalued by an ill-balanced mix of poorly designed houses or temporary dwellings."

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

> "2.(a) The buyer acknowledges that every person that purchases land at On the Beach (of which the land sold in this contract forms part) is required to comply with the attached Community Development Standards and Building Covenant Conditions;
>
> (b) The buyer agrees to sign the attached Continuation of Covenant and to be bound in all respects by the said covenants from date of settlement of this contract.
>
> (c) The buyer agrees to cause any person to whom he sells the land to complete and sign a notification in the same terms and deliver it to BGM Projects Pty Ltd."

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

[8] On 31 March 2019 Mr Durmaz placed a caravan on the property, indicating that he intended to live in it. Despite being told that having a caravan was in breach of the building covenants, Mr Durmaz stated he would not remove it.

[9] On 1 April 2019 Mr Durmaz informed BGM's contract administrator that he intended to build any house he wanted on the property, and did not intend to submit any building plans to BGM for approval, or to otherwise comply with the building covenants.

[10] By 22 May 2019 BGM became aware that Mr Durmaz had commenced construction works for a shed. Following objection by BGM, the solicitors for each side corresponded about the failure to obtain approvals under the building covenants. Mr Durmaz, for Durmaz Corporation, said it would undertake in writing to comply with the building covenants. That undertaking was supplied to BGM.

[11] Subsequently, Mr Durmaz caused a concrete slab to be poured, without approval. Applegarth J granted an interlocutory injunction restraining any further construction work in breach of the building covenants and without approval.

[12] Mr Durmaz subsequently sought approvals from BGM but they were rejected on various grounds. The order of Applegarth J was not varied to permit construction to proceed.

[13] A couple of months later Mr Durmaz informed BGM that he no longer owned the property, as Durmaz Corporation had sought to transfer the property to Mr Durmaz's brother, without requiring the brother to sign the Deeds which would

bind him to the building covenants. As a result, a further injunction was obtained to prevent the transfer of title from being registered. Those orders were made by Bowskill J on 28 August 2019, by consent.

[14] Subsequently, Mr Durmaz caused Durmaz Corporation to proceed to construct a non-approved shed, notwithstanding the injunction of Applegarth J. Mr Durmaz's position was that the Deeds binding Durmaz Corporation to the building covenants were illegal, given that a number of other owners had allegedly not signed similar Deeds. He alleged that there had been misrepresentations by BGM in relation to the Deeds.

[15] The dispute came before Brown J on 27 November 2019. There was no challenge to the fact that the shed had been constructed without approval from BGM, in breach of the building covenants, and in breach of the order of Applegarth J made on 4 June 2019.

Proceedings before Justice Brown

[16] Justice Brown made a number of findings which are not the subject of challenge in the present appeal. They were: BGM was entitled under the Deeds to enforce them;[2] Durmaz Corporation was aware of the building covenants and the construction was carried out without approval, in breach of the covenants and in breach of the order by Applegarth J;[3] Mr Durmaz accepted that he had constructed the shed notwithstanding that he was aware of the injunction made by Applegarth J, and knowing he did not have permission to do so under the building covenants;[4] and Durmaz Corporation proceeded on notice that BGM would take further legal action to restrain the breach, and knew of the wrongful nature of Mr Durmaz's acts in constructing the shed.[5]

[17] Mr Durmaz contended that not all owners had signed Deeds binding them to the building covenants, and therefore the covenants were illegal. He also contended that BGM had engaged in misleading conduct. However, Brown J found that he had presented no evidence to support those allegations, nor had he sought an adjournment to do so. In any event, her Honour found that it was clear that Durmaz Corporation had signed the Deeds and agreed to be bound by the building covenants.[6] The orders made were that Durmaz Corporation remove the shed and pay costs on an indemnity basis.

Consideration

[18] There are quite a number of substantial obstacles confronting success in this appeal. I will attempt to summarise them.

[19] First, the orders of Justice Brown were made against Durmaz Corporation, not Mr Durmaz personally. However, it is Mr Durmaz, personally, who is the appellant. The appeal is incompetent as the party the subject of the challenged orders is not a party to the appeal.

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2 Reasons below at [38].
3 Reasons below at [39]-[42].
4 Reasons below at [44].
5 Reasons below at [52].
6 Reasons below at [54].

[20] Secondly, the Notice of Appeal states the grounds to be: "… all grounds appeal based on the misrepresentation of contract for covernant [sic]". The only articulation of the grounds appears in the outline filed by Mr Durmaz. That included these points:

(a) he was asked to enter into a deed of covenant before the purchase commenced and agreed "with the belief that there was no ill intention by the contract";

(b) soon after, two things became apparent; one was that "my proposed build was not allowed for any reasonable reasons given to me"; and the second was that he "later learned from other residents that not everyone had entered into a signed deed of covenant";

(c) that was "a misrepresentation of the so called covenant and continued to this day, no purchaser was ever informed of this fact before signing and entering into a contract that has no value as a proposed product";

(d) he had recently found a file of a Mr Lee, "who had no contract of covenant in purchase nor did the previous owner"; after the case before Brown J he had sought access to that file; and

(e) his contention was that: "this whole event has been about the developer and his years of continuing efforts to impede upon residents, harass and hinder by almost all means in an effort to protect the contracts survival and preservation against litigation, when the first non signatories appeared instead of advising residents of the estate of the new situation with the contracts now to be varied and changed so that it may suit the new reality on the ground"; and "BGM Projects Pty Ltd continued to misrepresent the contracts and impede upon residents with the illegal misuse of the contracts causing individuals personal and financial hardship and harm".

[21] Thus, as developed during oral submissions before me, Mr Durmaz has articulated only one ground as the basis for the appeal. It is that the developer, BGM, had made a material misrepresentation in the introductory words of the community development standards and building covenant conditions. Specifically it was in the sentence: "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." The contention advanced was that there was evidence that some other lot owners were not bound to the covenants as they were not included in their contracts of sale, thereby making the assertion that all owners were bound, and the assertion that buyers could take comfort that their investment would not be devalued, misleading or deceptive.

[22] The central difficulty with that contention is that Mr Durmaz said that he only discovered the existence of other lot owners who were supposedly not bound by the covenants, a number of months after the contract between Mr Smith and Durmaz Corporation was completed. In the course of oral submissions before me, Mr Durmaz accepted that he had no contact with the developer at the time Durmaz Corporation entered into its contract with Mr Smith, and completed the purchase. Thus, there was nothing actually said or done by BGM at the time of the purchase, to Mr Durmaz or to Durmaz Corporation.

[23] Thus, if there was any misleading statement, it was confined to the sentence which said that 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." Those words are more aspirational than promissory. They do not, in my view,

imply that all lot owners will be bound by the covenants for all time. Even if there were some owners who, for a variety of reasons, ended up with contracts that did not bind them to the building covenants, that does not mean that the statement in the covenants themselves was misleading.

[24] Mr Durmaz referred, without evidence, to the fact that there might be upwards of a dozen owners who had purchased from mortgagees who had entered into possession. He referred to these as liquidation sales. He asserted, again without evidence, that those sales did not involve binding the purchaser to the covenants.

[25] Mr Durmaz had extracted from an archived court file some documents in proceedings between BGM Projects Pty Ltd and Ms Barnard and Mr Lee, the owners of Lot 93.[7] As best can be gleaned from those documents, principally an executed "Terms of Settlement" document between those parties:

(a) BGM sought to enforce the building covenants against Ms Barnard and Mr Lee on the basis that they bound them, or ran with the land; BGM disputed construction work done on Lot 93;

(b) Ms Barnard and Mr Lee disputed the binding effect of the covenants, and disputed that the covenants ran with the land;

(c) the parties agreed that the existing structures could remain, with modifications; and

(d) Ms Barnard and Mr Lee agreed that the covenants touch, concern and run with the land, and they were bound by them in the future.

[26] Even if those documents were admissible, they do not assist Mr Durmaz's contention. Plainly, BGM contended that the owners were bound by the covenants, regardless of whether they were in the contract of sale. So much can be inferred from the recorded contention, and acceptance, that the covenants touch, concern and run with the land.

[27] Thirdly, even if there was some form of misrepresentation, it is difficult to see how it sounds in any particular relief. Durmaz Corporation did not act under any misapprehension at the time it purchased the land, and was fully aware of the fact that Mr Smith (the vendor) was bound by the covenants, and bound to contract for the sale of the land on the basis that the covenants would continue. To that end Durmaz Corporation executed the Deeds. Even if the misrepresentation could be characterised as misleading or deceptive conduct, on the basis that contrary to what was represented, in fact not all owners were bound, it does not follow that the relief would result in the excision of the covenants from the contract or alternatively injunctive relief preventing BGM from enforcing them. The estate consists of 200 developed lots, 159 of which have been sold, and 90 houses having been built. Within that broad band of owners, the fact that a few might not be bound by the covenants does not render any statement made in the introductory section of the building covenants document misleading or deceptive.

[28] For these reasons I have come to the conclusion that the appeal has no realistic prospects of success. Its pursuit is vexatious and an abuse of process. Consequently, it should be struck out.[8] That makes it unnecessary to deal with the application for security for costs.

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7 Supreme Court of Queensland, BS 3069/2015.

8 *von Risefer v Permanent Trustee Co Pty Ltd* [2005] 1 Qd R 681 at [9]-[11].

[29] BGM seeks indemnity costs in the event that the notice of appeal is struck out. I am not persuaded that that is an appropriate order in the circumstances. True it is that the appeal is wrongly constituted and Durmaz Corporation is not the appellant. Also it is true that the articulated ground of appeal has no merit. However, the manner in which the appeal has been brought and conducted, to the extent that it has, does not warrant an order for indemnity costs.[9]

[30] I order:

1. The notice of appeal is struck out.
2. The appellant pay the respondent's costs of and incidental to the application on the standard basis.

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[9] *Robertson v Hollings & Ors* [2009] QCA 303, [6]; *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225; *Re Cameron* [1996] 2 Qd R 218, 220.