



[2005] QSC 244.

Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

REVISED COPIES ISSUED
State Reporting Bureau
Date: 21 October, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DUTNEY J

MARCELCLIFFE PTY LTD

Applicant

and

TINDINE PTY LTD

Respondent

ROCKHAMPTON

..DATE 29/09/2005

JUDGMENT

HIS HONOUR: This action came before me on Monday afternoon as an application for an interlocutory injunction to restrain the respondent proceeding to construct a house on the Panorama Heights Estate in North Rockhampton which was alleged to be in breach of the building covenant agreed to by the respondent at the time of purchase. The issue is in short compass and the matter was adjourned until today to allow each party to prepare any additional material that they considered to be relevant to a final determination.

The respondent is the registered proprietor of lot 29 on SP176990, having purchased the land from the applicant pursuant to a contract dated 10 June 2005. Attached to the contract was a restrictive covenant incorporating the following terms which might be thought to be relevant to this hearing.

- A. The buyer acknowledges and agrees that these covenants form part of the special conditions of the contract;
- B. The buyer further acknowledges and accepts that these covenants are in place to ensure a minimum standard of housing, landscaping and maintenance for Panorama Heights, and to protect the investment of each buyer within Panorama Heights.

...

DWELLING HOUSE SPECIFICATIONS:

1

Standard for Dwelling House

"Dwelling House" for the purposes of these covenants means a single family Dwelling House limited to two storeys but does not include duplexes, flats boarding houses, a lot or lots in a community title scheme or any other type of multi tenancy building.

10

...

20

Floor Area

A Dwelling House must not have less than 170 square metres of gross floor area for all habitable rooms (garages excluded).

30

...

Roof

A Dwelling House must have a tiled or factory processed coloured (Colorbond) roof, or such other material as the seller may pre-approve in writing.

40

50

A Dwelling House must not contain galvanised iron, zinc or aluminium coated steel or fibrocement sheeting externally or as roof cladding.

...

Walls

10

A Dwelling House must be enclosed with external walls of clay brick or cement rendered concrete block, or such other material as the seller may pre-approve in writing.

...

20

Colour Schemes

A Dwelling House must have external surfaces other than brick painted with good quality paint in neutral, conservative or tasteful shades.

30

...

Garages and Carports

40

Garages must not be constructed forward of the street front wall of the Dwelling House.

Garages should ideally be attached to and form part of the Dwelling House and be constructed with the same materials and painted in the same colour as the dwelling.

50

Garages must incorporate a roller or tiltadoor and be enclosed on all sides.

1

The Dwelling House must provide enough garage space for the accommodation of at least one vehicle.

10

In August, the respondent submitted a plan to the applicant for a proposed house on the land. The building depicted in the plan is a T shape. The garage and part of the habitable areas form the cap of the T and the balance of the habitable areas form the stem of the T.

20

The garage is shown as located wholly on the street side of the habitable portion of the house and forward of the street front wall of the balance of the house. The garage is shown as a structural part of the building. The main roofline of the garage is incorporated within the roofline of the balance of the house rather than as a gabled extension of the roofline, and the garage is separated from the habitable areas of the house by a non-structural partition.

30

40

The applicant submits that this construction is in breach of the restrictive covenant which should be construed to mean that the garage cannot be built forward of the balance of the house.

50

The respondent submits that the garage is such an integral part of the Dwelling House that the street side wall of the dwelling is in fact the front of the garage.

1

Whether the proposed construction offends the covenant is purely a matter of construction. Despite this, some observations on the evidence should be made. Although lot 29 is 1,034 square metres, or 40 perches in the old measurements, it has a street frontage of less than 21 metres.

10

The proposed house excluding the garage is 15.1 metres wide and 15.6 metres deep. Allowing normal setbacks from boundaries, there appears to be space if the house is set to one side of the allotment to place a driveway beside the house to a garage further back. The block is said to be a sloping one which presents its own difficulties.

20

30

The estate of which the allotment forms part was marketed through Real Way Property Consultants. Real Way Property Consultants is the agent shown on the contract by which the respondent purchased the land. The estate was marketed, in part at least, by means of a brochure exhibited to the respondent's material.

40

The advertising brochure makes reference to the existence of the restrictive covenant without indicating any details, but depicts a house constructed with the garage in substantially the position the applicant submits here is in breach of the covenant. Although there is an extension of a part of the

50

balance of the house extending forward of the main street front wall, the impression created is of a garage constituting the most forward part of the construction. If the street front wall of the Dwelling House is to be treated as the line of the main structure, the garage is wholly or substantially in front of that line.

1

10

Although the estate is very new, some houses are already being built. Lot 31, which is two doors from lot 29 on the same side of the street, has a house nearing completion. That house has the garage set forward of the street front wall of the balance of the house by about a metre.

20

Under the clause concerning garages, they are not required to be incorporated in the Dwelling House, and the draftsman has also drawn a distinction between a garage which is attached to the house and one which forms part of the house. The developer's preferred position is that the garage should satisfy both requirements.

30

40

Dwelling House is spelt with a capital D and a capital H. This indicates that it is used in the sense defined, that is, as a single rather than a multiple dwelling. The exclusion of the garage area from the minimum floor area requirement also suggests that in some circumstances, the Dwelling House might include the garage.

50

The clause can be given a sensible construction in accordance with its literal meaning if it is construed to mean that if

the garage is not constructed as an integral structural part of the Dwelling House, it must not protrude beyond the front wall of that structure. That would exclude garages which were detached or attached in such a way as not to be structurally part of the building. It also restricts the materials from which a garage can be constructed and the colour scheme, neither of which are restricted in the same way for a garage which is not integrated into and forming part of the Dwelling House.

There is no restriction of this type on any structure not part of the Dwelling House. To construe the clause in the way I have suggested appears to me to make the clause effective in its stated objective of preserving the standards in the estate. A garage can be built forward of the balance of the house if it is integrated into the house and forms part of it, but it must meet the building requirements of the Dwelling House. If it is not so integrated, it need not meet the standards of the Dwelling House but must not protrude beyond the Dwelling House.

In my view, what the clause means is that garages should ideally be attached to and form part of the Dwelling House and be constructed in the same materials and painted in the same colours as the dwelling - in other words, comply with the covenant for Dwelling Houses - but otherwise must not protrude beyond the front façade of the Dwelling House.

On balance, I find that the clause headed "Garages", properly construed, permits the respondent to construct on lot 29 in accordance with the plans exhibited to the material. Since this finding disposes of all the issues in the action, the action is dismissed with costs to be assessed on the standard basis.

1

10

20

30

40

50