

Litigating the enforcement of building covenants

Part 2

Introduction

1. This paper follows on from my previous article introducing this litigation and the discussion of the Construction Injunction. It specifically addresses the Transfer Injunction.

Transfer Injunction

2. The Transfer Injunction was an injunction preventing the transfer of the land without obtaining deeds in favour of BGM.
3. The events following the granting of the Construction Injunction, issued by his Honour Applegarth J, and giving rise to the application for the Transfer Injunction, were succinctly summarised by his Honour Morrison JA in the Appeal Proceeding, as follows:

[12] 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.'

4. While the Transfer Injunction was ultimately made by consent. BGM was almost left with no way to enforce the covenants and only a claim for damages but for the quick action of BGM's solicitors.
5. Durmaz Corporation had informed them in correspondence that it no longer owned the property and that it had been transferred to Mr Sean Durmaz who was Durmaz Corporation's director's brother. A search revealed that the transfer had been lodged but had not registered.
6. I received a call to appear urgently before the Supreme Court seeking an injunction preventing the registration of the transfer. After a number of interim agreements in relation preserving the status quo the matter, together with a foreshadowed application to amend the application, came on for a hearing before her Honour Justice Bowskill.
7. Detailed submissions were prepared for the Court, and ultimately the injunction made.

8. At this stage of the matter, the lessons were more about practice than the substantive law relating to restrictive covenants. Those lessons were:
 - (a) the importance of having a precedent draft application and order, which made the drafting of the documents for the instant matter much easier;
 - (b) being familiar with, and having available, the key authorities, as this meant that there was no scramble to locate cases, and allowing you to focus on important matters;
 - (c) some material is better than none, and the more that can be prepared the better (which segues neatly to the last lesson);
 - (d) it is very helpful to have an experienced instructing solicitor.

9. The next instalment will deal with the Final Injunction and highlight several matters of substantive law and practice.

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