In re BISHOP AND LYNCH'S CONTRACT

HERRING, C.J. 4, 14 DECEMBER 1956

Sale of land—Contract—Restrictive covenant—"Not to erect more than one private dwelling"—Dwelling-house altered and added to—Dwelling-house divided into two separate residences.

A numbered lot within a sub-division of land was subject to a restrictive covenant for the benefit of other lots in the sub-division to the effect that the original purchaser of such lot and his successors in title would "not at any time hereafter erect upon the said lot . . . any building other than a private dwelling upon the said lot . . . ." After the original sale of the lot, a dwelling-house was erected thereon and thereafter, in 1928, the interior of the house was divided into two sections by the erection of a wooden partition, and other alterations were made externally and internally. Each of the two sections became fully equipped for the purposes of a residence separate from the other. In 1956, a purchaser of the lot delivered a requisition on title alleging that the buildings erected on the land constituted a breach of the covenant in that they constituted more than one private dwelling, and she required the removal of the covenant or its modification to permit the buildings to conform therewith.

Held: (1) whether there was a breach or not was a question of fact to be determined in accordance with the facts of the case and in the light of the actual language in which the restrictive covenant was framed; (2) on the facts the alterations and additions made in 1928 did not amount to the erection of more than one private dwelling on the lot.

VENDOR AND PURCHASER SUMMONS.

By contract of sale dated 22 August 1956, the vendor, Susan Bishop, sold land in Caulfield described in the contract as lot 202 on a numbered plan of sub-division, to the purchaser, Lillian May Lynch, who now sought, *inter alia*, a declaration that a good title to the property sold had not been shewn upon facts which are fully set out in the judgment.

Stephen, for the purchaser, in support of the summons.—The state of the premises constitutes a breach of the covenant. Consequently, the vendor has not shown a good title. It is an infringement, notwithstanding that the result was arrived at piecemeal. There are two private dwellings on the land sold. The breach was committed in 1928. There has been no acquiescence such as to render the covenant unenforceable. The condition of the premises would be far from obvious to the passer-by. [He referred to the following: *Cobbold* v. *Abraham*, [1933] V.L.R. 385, at pp. 390-1; *In re Marshall and Scott's Contract*, [1938] V.L.R. 98; *Hepworth* v. *Pickles*, [1900] 1 Ch. 108; *Kenna* v. *Ritchie*, [1907] V.L.R. 386; *In re Handman and Wilcox's Contract*, [1902] 1 Ch. 199.]

Hewitt, for the vendor.—There has been no breach of covenant. What was done in 1928 merely constituted rearrangement within the building on the land and slight additions externally. This was "alteration", not "erection". The fact that there are now two almost self-contained residences upon the land is irrelevant in view of the wording of the restrictive covenant. In any case, the evidence shews that the breach (if any) has been acquiesced in, so that it is unenforceable.

Stephen, in reply.

Cur. adv. vult.

HERRING, C.J., read the following judgment: This is a vendor and purchaser summons, by which the applicant, Lillian May Lynch (the purchaser) sought, *inter alia*, a declaration that a good title to the property sold by the contract of sale dated 22 August 1956 had not been shewn.

The said property was described in such contract as being lot 202 on plan of sub-division No. 7162, and it appeared that such lot had become subject to a restrictive covenant for the benefit of the other lots contained in the said sub-division to the effect that the original purchaser of such lot "his heirs executors administrators and transferees will not at any time hereafter erect upon the said lot hereby transferred any buildings other than a private dwelling with a slate or tile roof and will not erect more than one such dwelling upon the said lot hereby transferred and that such dwelling with the outbuildings thereof shall cost not less than £500 . . . ." The contract of sale was expressly made subject to the said covenant.

The evidence showed that at some time before the year 1928 and presumably after the original sale of the said lot a dwelling-house was erected thereon, which comprised six main rooms together with an entrance hall, passage, one kitchen, one bathroom, two front porches and one rear verandah or sleep-out. The said house had been designed and built for the occupation of the present vendor, Susan Bishop, the respondent to the summons herein, her late husband and their two children. In 1928 the interior of the house was divided into two sections by the erection of a wooden partition between the entrance hall and the passage way. A door was placed further down the passage way to give free access between the two sections. A second bathroom and a second kitchen were built in and additional lavatory accommodation was installed. Each of the two sections thus became fully equipped for the purposes of a residence separate from the other. In carrying out this work, certain alterations were made to the external appearance of the property, *viz.*:—The building was extended at the rear to the extent of 8 to 10 feet—the new area having a skillion roof—and another chimney was added. An opening was made in the enclosed front porch, a doorway was made towards the rear of the building on the west side, a new detached laundry 10′ x 8′ was erected in the back yard of the property and a new gate was made in the fence on the eastern boundary adjacent to the skillion-roofed addition. The three gates to the streets were then numbered as follows:— The corner gate leading to the original front entrance porch was numbered 19A. The new side gate on the west leading to the skillion-roofed addition was numbered 19A and the gate on the north west corner leading to the newly opened porch retained its original number 19.

The plan and specifications for the work above described were duly approved by the Caulfield municipal council and the work was carried out under the supervision of the municipal building inspector.

In a letter to the vendor dated 31 August 1956, the solicitors for the purchaser made a requisition in the following terms:—"The buildings erected upon the land sold constitute a breach of the covenant contained in Instrument of Transfer No. 920972 to which covenant the title to the land sold is subject, in that such buildings constitute more than one private dwelling whereas the said covenant provides that not more than one such dwelling shall be erected on the land. The purchaser therefore requires the removal of the said covenant from the title to the

land sold or alternatively the modification of such covenant so that the buildings now erected on the said land shall conform to the provisions of the said covenant when so modified."

To this requisition the solicitor for the vendor made answer in his letter to the purchaser's solicitors dated 5 September 1956 as follows:— "The vendor does not admit that the buildings erected on the land constitute a breach of the covenant referred to. The vendor does not admit any obligation to remove the covenant from the title. The vendor does not admit any obligation to modify the covenant."

It is in these circumstances that it was contended by Mr. Stephen for the purchaser that the evidence shewed that a breach of the restrictive covenant had been committed and that consequently the vendor had not made a good title to the property. To force the title as it stood upon the purchaser he submitted might well involve her in a law suit, and so he maintained she should not be forced to accept the title, unless and until some action had been taken which would protect her from the possibility of being sued for breach of the covenant.

In support of his argument that there has been a breach of the restrictive covenant, Mr. Stephen referred to *In re Marshall and Scott's Contract,* [1938] V.L.R. 98. In that case there was a restrictive covenant, which provided that there should not be built on the land "any building save one dwelling-house." Mann, C.J., held that the building on the land of a villa containing two self contained flats, each structurally complete and separated by a wall that prevented access from one to the other, constituted a breach of the covenant. His Honour considered that the building erected comprised two "dwellings", therefore was not a single "dwelling-house".

Mr. Stephen contended that similarly the building on the land sold in the present case comprises two "dwellings" and that therefore there had been a breach of the restrictive covenant so far as it prohibited the erection of more than one dwelling.

Whether there has been a breach or not however is a question of fact to be determined in accordance with the facts of the case and in the light of the actual language, in which the restrictive covenant is framed. For as Mann, C.J., pointed out in the case cited, at p. 100, "small differences of language are of great importance and the decision often turns on them". Here the covenant is "not to erect more than one private dwelling upon the lot". And what was done was that first of all a building was erected, the erection of which did not constitute a breach of the covenant. For the house then erected was built as one dwelling, a dwelling for the Bishop family; it was not built as a step towards the ultimate provision of two dwellings. At the time, no one would seem to have contemplated the accommodation contained therein being subsequently divided into two.

All that can be complained of therefore as constituting a breach are the alterations and additions made in 1928, and the question is not whether thereafter two "dwellings" were to be found in the house built upon the lot, but whether what was done in 1928 amounted to the "erection of more than one private dwelling on the lot". In my opinion, this question only admits of an answer in the negative. There was no erection of a dwelling in 1928. All that was done was to alter an existing building by making some small additions to and rearranging the accommodation contained therein. There is I think a real distinction to be drawn between the erection of a building and the alteration of a build-

ing. Such a distinction was drawn by Lord Esher, M.R., in *Wendon* v. *London County Council*, [1894] 1 Q.B. 812, at p. 816. See, too, *Bruce* v. *Whyte* (1900), 37 Sc. L.R. 617; 2 Fraser 823, at pp. 828-9.

There may of course be cases where it becomes difficult to determine as a matter of fact whether what has been done amounts to the erection of a building rather than a mere alteration of an existing one. It may well be a question of degree, but as I have said, each case must be decided on its own facts, and on the facts of this case I am satisfied that what was done in 1928 cannot be regarded as a breach of the covenant. It is the erection of more than one dwelling on the lot that is forbidden. The covenant has nothing to say with regard to the alteration of the accommodation in a dwelling erected in accordance with the covenant, at any rate where as in this case the erection and the alteration are entirely unconnected the one with the other.

For these reasons I think there has been no breach of covenant shown to have taken place. The answer of the vendor to the purchaser's requisition is therefore sufficient and there should be, I think, on the summons a declaration that a good title has been shewn in accordance with the contract of sale.

Declaration accordingly.

Solicitors for the purchaser: *Weigall & Crowther.*

Solicitor for the vendor: *Trevor Morris.*

E.E.H.