IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 5926 of 2002

ALLEN JAMES TONKS &
CHRISTINE LYNETTE TONKS — Plaintiffs

v

PETER WILLIAM TONKS & ORS — Defendants

JUDGE:	BONGIORNO J
WHERE HELD:	Melbourne
DATE OF HEARING:	9 April 2003
DATE OF JUDGMENT:	13 June 2003
CASE MAY BE CITED AS:	Tonks v Tonks
MEDIUM NEUTRAL CITATION:	[2003] VSC 195

LAND – restrictive covenant – construction - number of houses on lot – *Property Law Act* 1958 s 84 (2)(b).

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr G. Baker	Duffy & Simon
For the Defendants	Mr J. Brett	Boothby & Boothby

HIS HONOUR:

1 This is an application pursuant to s 84(2)(b) of the *Property Law Act* 1958 for a declaration as to the true construction of a restrictive covenant affecting lot 3 on plan of Subdivision No 205935Q which relates to land in Buchanan's Road, Berwick. The plaintiffs are the registered proprietors of lot 3 on that plan of subdivision. The first and second defendants, Peter William Tonks and Leonie Jean Tonks are the owners of lot 1 on the same plan of subdivision and the third and fourth defendants Stephen Ross Woolsey and Julie Annette Woolsey are the owners of lot 2. Their properties are subject to similar restrictive covenants.

2 The restrictive covenant which affects lots 2 and 3 on the Plan of Subdivision is in the following terms:-

> ". . . (the registered proprietor for the time being) will not erect or cause or permit to be erected on the land hereby transferred or any part thereof any building other than a dwelling house.
>
> . . . . . ."

That which affects lot 1 has the words "& domestic out buildings" added after the words "dwelling house". The reason for this difference is not apparent but is, in any event, immaterial to the process of construction which the Court must carry out in respect of the covenant on lot 3.

3 The necessity for the Court to construe this restrictive covenant has arisen because of the desire by the plaintiffs to erect more than one dwelling house on the lot which they own, alternatively to offer the property for sale as a property upon which more than one dwelling house could be built. Their lot, lot 3, is the rear block of the three lot subdivision having access to the street by what is commonly referred to as a "battleaxe" configuration. It is considerably larger than lots 1 and 2.

4 The defendants, who enjoy the benefit of the covenant imposed upon lot 3, contend that it restricts the plaintiffs (and anyone to whom they sell that lot) to the

construction of one house only upon their land.

5 The question to be decided, as a matter of construction of the restrictive covenant, is whether the operative part of the covenant prohibits the construction of more than one house on any of these blocks and in particular on lot 3.

6 Although there may be other persons interested in restricting building on lot 3 of this subdivision to a single house, the presence of the owners of lots 1 and 2 before the Court as defendants who put that contention ensures that there is appropriate contradiction of the plaintiffs' case and obviates the need for further consideration as to whether any other interested parties ought to have been joined.

7 The construction of a restrictive covenant is approached by the Court in the same way it would approach the construction of any other document recording an agreement between parties. In this case the covenant has its origins in a contract of sale between one Alice Gamble and the plaintiffs. The covenant was registered on their title on 16 February 1990.

8 The object of interpretation is to discover the intention of the parties as revealed by the language they used in the document in question. Although both the plaintiffs and the defendants in this case filed affidavits, counsel conceded that the Court was not entitled to approach the task of construction by reference to evidence as to what the parties to the original contract of sale, the present proprietors of the relevant property or, for that matter anyone else thought the covenant meant. The matter is purely a question of construction, approached against the background of the facts which existed at the time the contract was entered into.

9 Mr J Brett, of counsel for the defendants, submitted that one's immediate impression upon reading the covenant was that it would prohibit more than one house being built on lot 3. He sought support for this submission from the Oxford English Dictionary which, not surprisingly, defined "a" as variously "one", "some" or "any" and also, in a more definite sense as "one" or "a certain". He referred to authority ranging from that of a single judge of this Court, Smith J in *Natraine Nominees Pty Ltd*

v Patton and anor[1] to an unreported decision of the Court of Appeal of Utah[2], but no decision to which he referred dealt with the precise words of this covenant.

10 In *Natraine*, Smith J construed a covenant which provided that:-

> ". . . no building may be erected . . . except a brick building to be used exclusively as a residence or dwelling house only or out building . . . in connection with such brick building",

as permitting the erection of a single residence only, although his Honour held that such single residence could contain more than one residential area. This covenant is clearly distinguishable from that with which the Court is currently concerned in that it commences with a prohibition on building generally, subject to just one exception. That exception is a brick building to be used exclusively as a residence. Notwithstanding Mr Brett's cogent and lucid submissions on this case I do not consider it of assistance in resolving the problem with which I am presently confronted. The general prohibition with which the *Natraine* covenant commences could easily have been made subject to a plurality of exceptions. It wasn't, rendering Smith J's decision inevitable.

11 In *Munns v Watson*[3] Lowe J construed a covenant that:-

> ". . . no building shall be erected by the covenanting parties on the said lot except a double fronted house with outbuildings for residential purposes",

as permitting the erection of a double fronted villa containing two residences. His Honour declined to answer a question as to the nature and extent of the restriction imposed by the covenant but contented himself with merely stating that he did not consider the building proposed would breach it.

12 In the Utah case to which I have already referred the Court of Appeal considered that the indefinite article "a" does not always mean one. However, in that case a covenant which limited the types of buildings on the subject land to "a one family

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1 [2000] VSC 303

2 *Holladay Duplex Management Co v Howells* (unreported 25 April 2002) [2002] Ut App 125

3 [1937] VLR 178

dwelling house" had to be interpreted as restricting the property owner to the building of only one house. It could have meant nothing else.

13 Other cases from England and Scotland relied upon by Mr Brett as analogous were not of great assistance in construing the covenant under consideration. The richness of the English language is such that even slight changes in the wording used or even in the order in which words are used can have a significant effect on the meaning of phrases which, at first glance, appear similar.[4]

14 Mr G Baker of counsel for the plaintiffs called, in aid of his argument that the covenant did not restrict his clients to the building of only one house, s 61 (c) of the *Property Law Act* 1958 which provides that in all deeds, contracts, wills, orders and other instruments, unless the context otherwise requires, the singular includes the plural and vice versa. But this common device used in statutes concerned with interpretation is always subject to the context in which the words are used. It does not answer the question for the Court in this case.

15 The task of construction commences with a determination of the purpose for which the covenant was inserted in the original contract. In this case there appear to be two possible answers to this inquiry. The covenant could be directed to ensuring that lot 3, and for that matter the whole subdivision, was maintained as a residential area without restriction on the number of dwelling houses constructed on each block. Alternatively, the purpose of the covenant might have been not only to maintain the residential character of the area but also to restrict the number of dwelling houses to one on each block.

16 Mr Brett argued that having regard to the battleaxe configuration of lot 3, if the covenant did not restrict the number of dwelling houses which could be built on it to one, traffic, including vehicular traffic, on the driveway of lot 3 (the handle of the battleaxe) would be considerably increased to the detriment of the amenity of the other two blocks. This would be particularly so with respect to the block adjacent to

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4 See *Re Marshall & Scott's Contract* [1938] VLR 98 at 100 per Mann CJ.

lot 3's driveway, lot 2. This, argues Mr Brett, is the context in which the restrictive covenant was inserted in the original contract of sale and is the context, accordingly, in which it falls to be construed. But this is only one aspect of the context in which the covenant was created. The size of lot 3 might not be an immaterial consideration. Clearly more than one dwelling could fit comfortably within its area.

17 Attractive as Mr Brett's argument appears, I am unable to accept it. If the parties to the original covenant had wished to restrict the number of dwelling houses built on each of these lots they could have done so very simply and definitively by replacing the word "a" in the covenant with the word "one", or by making some similar simple amendment. The true construction of the covenant is that it prohibits the placing of any building on the land *unless* that building is a dwelling house. Provided that any building constructed can be properly described as a dwelling house there would be no breach of the covenant. The covenant says nothing, in my opinion, as to the number of dwelling houses which might be built. To import a restriction as to the number of houses which might be built on lot 3 into the covenant would extend its effect beyond the words used by the parties without any warrant for doing so.

18 The plaintiffs are entitled to a declaration pursuant to s 84(2)(b) of the *Property Law Act* 1958 that upon the true construction of the covenant contained in the instrument of transfer in respect of lot 3 on plan of subdivision no LP205935Q, being the whole of the land in Certificate of Title Volume 9747 Folio 756, in which Alice Gamble was the transferor and the plaintiffs were the transferees, and which was registered on 16 February 1990, it does not restrict the registered proprietors from erecting more than one dwelling house on the said lot. There will be a declaration accordingly.

19 The plaintiffs are, *prima facie*, entitled to an order for costs. Should the defendants wish to contest this position they should arrange with my Associate for the matter to be listed for argument as to costs at a convenient time. Otherwise, there will be an order that the defendants pay the plaintiffs costs to be taxed.
