MANN C.J.

1937

Dec. 16.

In re MARSHALL AND SCOTT'S CONTRACT.

Real property—Restrictive covenant—Not to erect any building save one "dwelling house"—Erection of villa containing two flats—Whether a breach of covenant.

A restrictive covenant affecting certain land provided that there should not be built on the land "any building save one dwelling house". A villa containing two flats was erected on the land.

Held, the erection of such a building constituted a breach of the covenant.

Ex parte High Standard Constructions Ltd., [1929] 29 S.R. (N.S.W.) 274, applied.

VENDOR AND PURCHASER SUMMONS.

The applicant herein, one Queenie Marshall, was the registered proprietor of an estate in fee simple in certain land in Caulfield. This land was subject to a restrictive covenant which provided that there should not be built on the land "any building save one dwelling house". There was erected on the land a brick villa with a tile roof which was divided into two dwellings by a brick wall running from the front to the rear and extending only up to the height of the ceiling and not up to the roof. This wall did not run in a straight line from the front to the rear of the building, but was broken in such a way that it would not be readily possible to create a party wall easement or to obtain separate titles to each of the two parts of the building. There was no means of communication between the two dwellings and each had a separate entrance.

The applicant had entered into a contract for the sale of the land and building to one John Scott, the respondent herein, but was unable to comply to the respondent's satisfaction with a requisition as to whether the building complied with the restrictive covenant. The applicant thereupon took out this summons pursuant to sec. 49 of the *Property Law Act* 1928 whereby she sought a declaration that the building did not constitute a breach of the restrictive covenant.

Coppel, for the applicant—The structure on the land is a villa comprising two flats. The covenant merely prohibits the erection of more than one building or of a building used otherwise than as a dwelling house. [He referred to *Munns* v. *Watson* (*a*); *A.-G.* (*ex relatione Jackman*) v. *Griffith* (*b*); *Cobbold* v. *Abraham* (*c*).]

(*a*) [1937] V.L.R. 178.

(*b*) [1934] V.L.R. 338.

(*c*) [1933] V.L.R. 385.

Norris, for the respondent—There has been a breach of the covenant. [He referred to *Ilford Park Estates Ltd.* v. *Jacobs* (*d*); *Ex parte High Standard Constructions Ltd.* (*e*); *A.-G.* (*ex relatione Jackman*) v. *Griffith* (*f*).]

Coppel, in reply—*Ex parte High Standard Constructions Ltd.* (*g*) was not followed in *Cobbold* v. *Abraham* (*h*) or in *A.-G.* (*ex relatione Jackman*) v. *Griffith* (*i*). It disregards *Kimber* v. *Admans* (*j*) and *Rogers* v. *Hosegood* (*k*).

MANN C.J. After some consideration, and not without reluctance, I have come to the conclusion that the erection of this building is a breach of the covenant. I have to deal with a covenant (limiting myself to the particular words) not to "build any building save one dwelling house". The authorities are difficult to refer to individually, and I shall not do so except in a general way as no general principle appears, except this, that in construing a covenant the words should be given their meaning in common vernacular use, and not regarded as terms of art to be given some special meaning.

There is no dispute as to the facts in the present case. They are that the vendor erected a building which clearly comprised two dwellings, each structurally complete, separated by a wall preventing access from one to the other, and under one roof. So far as external appearances are concerned the building appears to be of the kind usually referred to as a house. But I am not concerned only with the external appearance of the building. I have to determine its actual nature. I think it is a mistake to split up the phrase "dwelling house", and construe it as referring first to a "house", and then construe the adjective "dwelling" as limiting it to a "house to be dwelt in". It should be construed as a composite phrase.

There is much to be said for the view that there is no dwelling house at all. The view taken by Harvey C.J. in Eq. in *Ex parte High Standard Constructions Ltd.* (*l*) is that there is a great deal to be said for the view that the phrase "dwelling house"

(*d*) [1903] 2 Ch. 522.
(*e*) [1929] 29 S.R. (N.S.W.) 274.
(*f*) [1934] V.L.R. 338.
(*g*) [1929] 29 S.R. (N.S.W.) 274.
(*h*) [1933] V.L.R. 385.
(*i*) [1934] V.L.R. 338.
(*j*) [1900] 1 Ch. 412.
(*k*) [1900] 2 Ch. 388.
(*l*) [1929] 29 S.R. (N.S.W.) 274.

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means a house designed and constructed as a house to be dwelt in by one family. This building is of a type which calls for a different description. It comprises two dwellings and a building comprising two dwellings is not a single dwelling house, nor, it may be said, is it two dwelling houses. I base my decision on the two authorities most applicable, *Ex parte High Standard Constructions Ltd.* (*m*) and *Rogers* v. *Hosegood* (*n*) in the Court of Appeal.

I should have said that one authority cited is not really applicable. That is *Kimber* v. *Admans* (*o*), which decided that a building containing several flats is one house. It is not in point, inasmuch as the point for present determination is not whether it is a house, but whether it is a dwelling house. The decision of the Full Court in *A.-G.* (*ex relatione Jackman*) v. *Griffith* (*p*) is, I think, upon careful reading, of no help for it dealt with a by-law relating to the minimum amount of land for the erection of dwelling houses other than semi-detached houses and for the erection of semi-detached houses. It was pointed out very clearly by Macfarlan J. in the Court of first instance that the by-law was not framed with any attention to the erection of flats, and what the decision really amounts to is that a building containing flats is not the same thing as two houses joined together. The leading judgment in the Full Court, that of Irvine C.J., differentiates the cases on restrictive covenants in which the document to be construed is different and the language also is often different. The decision of my brother Lowe in *Munns* v. *Watson* (*q*) is, again, a decision where the question was whether a house or a building containing two flats infringed a covenant not to erect any building "except a double-fronted house with outbuildings for residential purposes". He held that houses can be built for several purposes and that the covenant only required that the house must be built to reside in. These small differences of language are of great importance and the decision often turns on them.

I do not think that such a building as I have here, designed in the way I have stated, can be described in ordinary language as one dwelling house. Either it is two dwelling houses under one

(*m*) [1929] 29 S.R. (N.S.W.) 274.
(*n*) [1900] 2 Ch. 388.
(*o*) [1900] 1 Ch. 412.
(*p*) [1934] V.L.R. 338.
(*q*) [1937] V.L.R. 178.

roof or a composite building which requires some other word or phrase to describe it. I need hardly say that I have arrived at this conclusion with some hesitation and not with as much assurance as I should like. But I have considered that to hold otherwise on the covenant in this case would render nugatory restrictive covenants in many other cases which have only slight variations from this. It is very desirable that a definite meaning should be given to the phrase "dwelling house". I cannot find a case where that has been done except in New South Wales. True it is that in that case the covenant referred to a "house", but the learned Chief Judge in Equity interpreted it as "dwelling house" and gave his decision on the meaning of "dwelling house". There is nothing in the other cases referred to which is contrary to this.

The declaration will be refused.

Order accordingly.

Solicitors for the applicant: *Stewart & Dimelow.*

Solicitors for the respondent: *Bullen & Burt.*

W. K.