stantial part at least of the period of three years and three months ending with the presentation of the petition in May 1955 that no period of three years' desertion without just cause or excuse would remain. Indeed, I am not satisfied, in view of the evidence as to what happened after the separation began in February 1952, that there was not just cause or excuse for the respondent's absence for the full three years and three months, or even that there was not constructive desertion on the part of the petitioner for three years and upwards. Even, however, if there was not such constructive desertion, I cannot say on the evidence here that the petitioner's conduct was merely the ordinary wear and tear of conjugal life, or that it was not of such a grave and convincing character that the respondent's withdrawal for at least a substantial part of the period of three years and three months was reasonable on her part.

It follows that the petition must be dismissed.

Petition dismissed.

Solicitor for the petitioner: *K. P. Rees.*

P.A.W.

JACOBS *v.* GREIG.

SHOLL J. MARCH 8, 13, 1956.

Vendor and purchaser—Injunction—Restrictive building covenant in subdivisional scheme—Restriction against house except if brick or stone with slate or tile roof—"Brick veneer" house not permitted—Vertical structure, internal and external, must be substantially wholly of brick or stone.

A restrictive covenant that "any such building shall not be erected of any material other than brick or stone with a tiled or slate roof" does not allow the erection of a building, the vertical construction of which is not substantially wholly of brick or stone, and, in particular, does not allow the construction of a brick veneer building.

MOTION FOT INTERLOCUTORY INJUNCTION.

Donald Jacobs and Dorothy Alice Jacobs, who were husband and wife, were the joint registered proprietors of an estate in fee simple in lot 21 on plan of subdivision No. 21131 at Toorak. The defendants, Winifred Maie Greig, Simon William Douglas Gallaway Greig and Robin Carmichael Greig were the joint registered proprietors of an estate in fee simple in lot 18 on the same plan of subdivision and they were in the course of erecting a brick veneer house on their lot. The plan of subdivision comprised 34 lots and the subdivision was carried out by the Australian Mutual Provident Society, which was then the registered proprietor of the whole of the land. All the lots had been sold and in each case the contract of sale contained a condition to the following effect:—

The land is sold subject to the following restrictive covenant: no building shall be erected on any lot sold other than one detached private dwelling house or one detached building not exceeding two storeys in height comprising two residential

maisonettes or two residential flats, one above the other, and any such building shall not be erected of any material other than brick or stone with a tiled or slate roof. A covenant giving effect to this condition shall be inserted in the transfer to the purchaser in such form as the vendor shall think necessary and shall run with the land.

The transfer of lot 18 to the defendants and that of lot 21 to the plaintiffs contained a restrictive covenant in the form set out in the contract of sale.

The plaintiffs issued a writ against the defendants claiming an injunction to restrain them from erecting or continuing with the erection of what is commonly called a brick veneer building, and damages. By notice of motion served with the writ the plaintiffs sought an interlocutory injunction.

Voumard Q.C., (with him, *Patrick*), for the plaintiffs.

Coppel Q.C., (with him, *Fullagar*), for the defendants.

Cur. adv. vult.

SHOLL J. read the following judgment: The plaintiffs, who are husband and wife, are the joint registered proprietors of an estate in fee simple in lot 21 on plan of subdivision No. 21131 at Toorak. On their land is erected a two-storey house, where they live, known as No. 10, Kent Court. The defendants are the joint registered proprietors of an estate in fee simple in lot 18 on the same plan of subdivision, and there is at present in course of erection on their land a house in which they propose to live, and which will be three doors further east in Kent Court than the plaintiffs' house. The plaintiffs allege that the defendants' house contravenes a restrictive covenant which binds the defendants and which the plaintiffs are entitled to enforce.

Plan of subdivision No. 21131 comprises 34 lots, and the subdivision was carried out some years ago by the Australian Mutual Provident Society, which was then the registered proprietor of the whole of the land. The land was offered for sale at two subdivisional auction sales, held on the 16th December 1950 and the 19th December 1953, respectively, and all the lots were sold either at those sales or subsequently thereto. In each case the contract of sale contained a condition to the following effect:—

The land is sold subject to the following restrictive covenant: No building shall be erected on any lot sold other than one detached private dwelling house or one detached building not exceeding two storeys in height, comprising two residential maisonettes or two residential flats, one above the other, and any such building shall not be erected of any material other than brick or stone with a tiled or slate roof. A covenant giving effect to this condition shall be inserted in the transfer to the purchaser in such form as the vendor shall think necessary and shall run with the land.

In each case (save as to three lots not yet transferred) the subsequent transfer contained a restrictive covenant in a form corresponding with that contained in the transfer of lot 18 to the defendants' predecessors in title. That was as follows:—

And the said Marie Kathleen Walsh and Theodore Martin Walsh do hereby for themselves their heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred covenant with the

said Australian Mutual Provident Society and its transferees registered proprietor or proprietors for the time being of the land in the said plan of subdivision remaining untransferred in the said certificate of title volume 2986 folio 019, that they the said Marie Kathleen Walsh and Theodore Martin Walsh their heirs executors administrators or transferees registered proprietor or proprietors for the time being of the land hereby transferred, will not at any time hereafter erect or build on any lot sold other than one detached private dwelling house or one detached building not exceeding two storeys in height comprising two residential maisonettes or two residential flats one above the other, and any such building shall not be erected of any material other than brick or stone with a tiled or slate roof, and it is intended that this covenant shall run with the land hereby transferred and shall be set out as an encumbrance on any certificate of title to issue for the said land or any part thereof.

Lot 18 was transferred by the Society to Marie and Theodore Walsh by transfer dated the 10th February 1954, and registered on the 26th February 1954 as No. 2624619. The Walshes subsequently transferred that lot to the defendants, and the latter's certificate of title is expressed to be subject to the covenant contained in transfer No. 2624619.

Lot 21 was transferred by the Society to Henry and Phyllis McBean by transfer dated the 1st March 1954 and registered on the 10th March 1954 as No. 2625816. The McBeans subsequently transferred lot 21 to the plaintiffs, and their certificate of title is expressed to be subject to a similar encumbrance.

In these circumstances it was common ground between the parties to the present litigation that there had been established a building scheme such that, *primâ facie*, the registered proprietor of any lot in the subdivision could enforce the restrictive covenant in respect of any other lot. In my opinion that is a correct view of the result of the evidence, but in point of fact it would not matter in this case if there were no building scheme in the technical sense, since the original transfer of the defendants' lot was earlier in time than that of the plaintiffs' lot, and the latter was therefore, at the time of the transfer of lot 18 to the Walshes, part of the land remaining untransferred in the original certificate of title.

The evidence does not show whether the plaintiffs themselves built their house at No. 10 Kent Court or bought it already erected from the McBeans.

On the defendants' land the building in course of erection is a single-storey brick veneer dwelling-house, and until a date after the commencement of this action it was to have a flat aluminium roof. On the 8th February last the erection of a wooden framework for the walls was begun. Next day the plaintiffs instructed their solicitors, and correspondence and conversations between the parties' solicitors ensued. On the 17th February, the plaintiffs issued the writ in this action. The material allegation for present purposes is as follows:—

In breach of the said covenant the defendants are causing and/or permitting the erection on the defendants' land of a building which is erected of material other than brick or stone and which will when completed have a roof which is not a tiled or slate roof.

The plaintiffs claimed an injunction and damages, and by notice of motion served with the writ they sought an interlocutory injunction. By agreement of the parties building operations were temporarily suspended on the 6th March, and the motion for an interlocutory injunction came before me on the 8th. In an affidavit sworn on the 6th March,

the defendant R. C. Greig deposed that although the plans of the defendants' house provided for an aluminium roof, it was now intended that the roof should be of slate, and that although the plans also provided for small sections of woodwork under the eaves on three sides of the house, it was no longer intended to face with timber any of the external walls. The defendants' architect, Mr. Rivett, also deposed that the roof would now be of true slates, and that all the external walls would now be entirely of brick.

The plaintiffs' counsel expressed themselves as thereupon satisfied, so far as the roof was concerned, with the sworn statements of the defendant R. C. Greig and his architect as to the change in plans, but pressed nevertheless for an injunction to restrain altogether the erection of a brick veneer house.

The method of construction known as "brick veneer" is, I believe, tolerably well known in this country at the present time. It was explained in the affidavits, and additional details were given by Mr. Rivett during cross-examination in the witness box. It is sufficient for present purposes to say that the defendants' house, if completed according to the plans as now modified, would be a structure having the inner framework of its external walls constructed of timber, with a brick veneer, or "skin", of brick outside them. The thickness of the brick skin would be 4½ inches, the width of a single brick. The inner surface of the external walls would be of plaster sheets or wood affixed to the wooden framework. The whole of the internal walls would be of wood and plaster or similar material. The weight of the roof (except in the case of the garage) would be carried on the timber framework, though by modifying the plans still further it could, apparently, be transferred to the external brick walls. According to Mr. Hines, an architect who has made an affidavit on behalf of the plaintiffs, the roof timber construction which has been partially completed for the purpose of holding the flat roof originally proposed is not of a pitch suitable to take slates or tiles. Presumably the roof will now have to be redesigned to carry slates, unless it is first independently rendered waterproof, and slates then placed on top on a flat waterproof surface. However that may be, Mr. Voumard conceded that if the whole roof was made of true slates, he could not contend that the covenant required the roof to be of any particular pitch, or forbade the construction of a flat slate roof.

The general nature of the defendants' building is well illustrated by photographs Nos. 7 and 8 exhibited to Mr. Rivett's affidavit. From these photographs and from the evidence which I have outlined, it is apparent that the only brick construction in the whole building (save possibly for the chimneys, if any, of which no mention has been made) will be the external skin of the external walls.

Dr. Coppel tendered, as part of Mr. Rivett's affidavit, an analysis of the type of construction adopted in the case of each of the 28 buildings (including the defendants') erected, or in course of erection, on the subdivision. Six of the lots are still vacant. Mr. Voumard objected to the admission of the evidence, but I admitted it on the ground that it might be relevant to the question whether the plaintiffs' proper remedy, if they were entitled to any, should be an injunction or merely damages, and to the question whether the plaintiffs were themselves disentitled to enforce the covenant at all. Summarized, and assuming for the present that the covenant as to materials applies to private dwellings as well as to maisonettes or flats, the evidence shows:—

(1) that (assuming that flat roofs are not of slate or tile) the main roof of two houses—those on lots 9 and 15—is not of those materials;

(2) that in eleven cases, the roofs of subsidiary portions of the main buildings (such as sun-rooms, garages, and bay windows) are not of slate or tile;

(3) that in one case (lot 9), the north wall is approximately 75 per cent timber and glass, with brick at the ends, and with no brickwork above the floorline for approximately 28 feet;

(4) that in one case (lot 15) portion of the front wall of the garage above the door, as shown in photograph No. 1, is of vertical timber boards and that in another case (lot 20), two gables of the house are sheeted with weatherboards above the ceiling line, as shown in photograph No. 6;

(5) that on lot 24 there is a house with "stucco" walls, though there is nothing to indicate what the construction is under the stucco.

One of the garage roofs which is not of slate or tiles is the plaintiffs' own—see photograph No. 6—and next door to the plaintiffs' house is the house with the weatherboard gables, shown in the same photograph. So far as the rest of the buildings are concerned, the roofs of the main structures are of tile, where the roofs have been completed, and the external walls are of brick. There is nothing to indicate that any are of brick veneer, and I assume, in the absence of any suggestion to the contrary, that they are either of solid brick or "cavity-brick" construction.

I do not find in this evidence any ground for denying the plaintiffs the remedy of an injunction if they are right in their contention that the defendants are in breach of the restrictive covenant. I think myself that the evidence shows that the roofs of the houses on lots 9 and 15 have been erected in breach of the covenant, and that the gabling of the house on lot 20 is probably in the same position. I am not prepared on the present evidence to say that the north wall of the house on lot 9 constitutes a breach of covenant, though it may well do so. I consider that the plaintiff's own garage roof has been erected (but whether by themselves or their predecessors in title, I do not know) in breach of the covenant, and the same is probably true of the roofing of subsidiary structures on lots 5 and 34. I am not prepared to say that the flat roofs to porches, or car-ports, or the canopies over bay-windows, all mentioned by Mr. Rivett, amount to breaches of the covenant; for I think a structure may be so subsidiary in relation to the main building that it ought not fairly to be held to be within the contemplation of the clause. In each case it is a matter of degree, and each case would require to be separately examined. I should not, for instance, have thought that the erection of the bay-window canopies shown in photographs Nos. 5 and 6 ought to be held to have amounted to a breach of covenant. On the whole the evidence fails to show that there has been on the estate any general or widespread departure from the covenant. Rather—and still assuming it to apply to private dwellings—the evidence tends to indicate a general observance of it, save for a few quite minor departures from it, and, so far as roofing materials are concerned, two major departures. Certainly there is no evidence that any brick veneer construction has been carried out anywhere on the subdivision.

Apart from contentions based on the type of construction adopted by other building owners, with which I have already dealt, the defendants relied upon two main contentions in answer to the plaintiffs' claim for an interlocutory injunction.

Dr. Coppel contended, in the first place, that upon the proper construction of the covenant the words "and any such building shall not be erected of any material other than brick or stone with a tiled or slate roof" referred only to maisonettes or flats—*i.e.*, that the word "building" referred back to the only "building" expressly mentioned previously in the clause, *viz.*, "one detached building not exceeding two storeys in height comprising two residential maisonettes or two residential flats one above the other". He suggested various reasons (which I think it unnecessary to recapitulate here in detail) why it might have been thought sufficient to impose restrictions as to building materials upon persons erecting flats or maisonettes, and to leave the builders of private dwellings an unrestricted choice, as was apparently done with regard to the height of such dwellings. Mr. Voumard on the other hand contended that in a subdivisional scheme such as the evidence showed this to have been, the obvious course for the vendor was to protect each purchaser of a lot as to all other lots, and that it was in the highest degree improbable that the subdividing society intended that private dwellings might be constructed, for example, of weatherboard or plaster or similar material, with galvanised iron roofs, or that it was proposed to leave the restriction of such methods of construction in the case of dwelling houses merely to the operation of the relevant building regulations or bylaws, or the personal pride of particular houseowners. He suggested that before the words "other than" there were to be understood some such words as "any erection or building", the nouns corresponding with the verbs in the preceding phrase "erect or build", and that the words "any such building" might then without difficulty be read as referring to any buildings being dwelling-houses, maisonettes, or flats.

Although the covenant is clumsily drawn, I do not feel any real doubt that on this point the view contended for by Mr. Voumard is the right one. According to one grammatical reading, and perhaps the reading which would first occur to the uninformed reader, the clause might be construed as the defendants suggest, but I think the result would be so curious that the Court ought without hesitation to adopt the other view, which, after all, is grammatically possible and produces a provision which is eminently likely to accord with the probable intention of all parties to the original contracts and transfers. I hold, therefore, that the restriction as to materials applies to private dwelling-houses.

Dr. Coppel's second contention was that, even if the restriction as to materials did apply to the defendants' house, their method of construction (now that their plans had been changed) did not infringe it. Since the defendants' house would have the external surface of its external walls entirely composed of brick, it was immaterial, he argued, that otherwise the substantial vertical construction of the house would be of timber or other material not being brick or stone. It was obvious that the covenant could not be read so literally that everything in a house—including floors, windows, doors, plumbing, staircases, and fixtures—must be of brick or stone. Since the covenant must therefore be read down, it should be construed, Dr. Coppel said, as narrowly as possible, and, so to speak, *contra proferentem—i.e.*, against the original subdivider and covenantee. It should therefore be read as referring only to the external visible materials used in the construction of the buildings affected by it—*i.e.*, as a clause designed only to preserve the aesthetic amenities of the estate. Dr. Coppel reinforced this argument by refer-

ring to the fact that there must be many roofing materials just as fireproof, and no doubt just as expensive, as slates or tiles; the roofing provision therefore seemed to have merely an aesthetic purpose, and the reference to brick or stone ought, in his submission, to be similarly read.

Mr. Voumard, on the other hand, argued that the covenant as to building materials was to be understood as probably designed to protect purchasers with regard to the appearance, strength, durability, cost, and fireproof qualities of the other buildings to be erected on the estate, though the weight to be attached to any one or more of these factors might vary in different minds. However that might be, the covenant, he said, must be read, so far as it referred to brick or stone, as meaning that the vertical construction of any building must be substantially wholly of one or other or both of those materials. He would of course exclude, I suppose, doors and windows which are habitually and conventionally made of other materials, and decorative additions (such as stucco or cement or plaster coats) such as are frequently superimposed on the main vertical structure of a house. He limited this contention to vertical construction, since roofing materials were separately referred to, and it was common ground that the covenant was not aimed at horizontal structures such as floors or ceilings.

In my judgment, the covenant should be read according to the construction contended for by the plaintiffs. It is not satisfied, I consider, unless the vertical construction of a building—and this applies to internal as well as to external walls—is substantially wholly of brick or stone, in the sense above stated. Of course, all such covenants, including this covenant, must be read as they would be understood by an ordinary person, accustomed to the ordinary current use of the English language in the relevant locality, and acquainted with current social habits and usages. No one would read this covenant as requiring that floors, stairs, rafters, or doors should be of brick or stone, or as essaying to interdict on the estate the otherwise common practice of using glass windows, metal or porcelain plumbing materials, or concrete or terrazzo flooring, or cement or plaster rendering over brick walls. On the other hand, I am satisfied that an ordinary resident of Victoria, reading this covenant in the current decade, would understand it as requiring that the vertical construction of the relevant structures should be substantially wholly of brick or stone, and as forbidding *inter alia* the use of the method of construction known as "brick veneer". I am satisfied, and I find, that the method of construction which the defendants are employing and intend to continue to employ for the vertical structures of their dwelling is not of brick or stone, within the meaning of the covenant—either as to the external walls or as to the internal walls. The outer walls are partly, indeed largely—but not substantially wholly—of brick; a substantial portion of their structure is also of wood. The internal walls are not of brick at all. If the timber elements were removed from the outer and the inner walls, and a mere single-brick construction were still employed in both cases, the building would, I think, comply with the covenant so far as the walls were concerned; but whether such a method would be architecturally practicable I do not know.

At all events, I am of opinion, and I find, that the defendants are in breach of the covenant, so far as it requires that the building be not erected of any material other than brick or stone, and after considering the authorities relevant to the granting of interlocutory injunctions I am of opinion that an injunction must go.

I took time to consider my decision here principally because there is no modern authority upon the construction of such a covenant. That may seem surprising, especially since covenants in similar form have in my own experience been quite commonly used in Victoria for many years. The absence of authority may however indicate that until the brick veneer method of construction was introduced, the question of infringement or non-infringement seemed too clear for argument. The only authority which the industry of counsel has unearthed is *Powell* v. *Doubble* (unreported, 1832, before Malins V.-C.), which is noted in *Sugden on Vendor and Purchaser* (14th ed.), p. 29. In that case particulars of sale described a house as a brick-built dwelling-house. In fact, it was built partly of brick and partly of timber; some parts of the exterior were only lath and plaster; and there was no party-wall. Malins V.-C. held that the misdescription was too serious for the Court to decree specific performance with compensation; such a description meant, he held, that the house "was brick-built in the ordinary sense". No doubt that is merely a decision as to what that expression meant in one part of England 124 years ago, but I think it does illustrate the proper approach to this case.

I should add that I do not find myself in agreement with Dr. Coppel's contention that the covenant does not apply at all to outbuildings or other structures separate from the main structure. It is impossible to read the covenant as prohibiting altogether the erection of such structures; therefore they must be comprehended within the expression "one detached private dwelling house or one detached building", etc. Those expressions must then be read as if they contained the words "including all usual or proper outbuildings or other structures". It does not of course follow from that that the requirement as to brick or stone construction is intended to be applied to every such outbuilding or other structure. It is a matter of construing the covenant according to common sense in the light of current usage and custom. A dog-kennel or a pergola need not be of brick or stone; a garage, I should think, must be. In the case of a summer-house, the answer might depend on its size and position.

On the plaintiffs' undertaking as to damages in the usual form, which Mr. Voumard has already offered on their behalf, there will be an injunction restraining the defendants, by themselves, their servants and agents, pending the trial of the action or further order, from continuing to erect or have erected on lot 18 any building the vertical construction of which is not substantially wholly of brick or stone, and in particular, any building according to the method of construction known as brick veneer. I do not so word the injunction as to require the defendants to take down or remove what is already there; that matter had best be left till the trial. But I make it plain that the defendants cannot in the meantime further continue their building as planned.

Interlocutory injunction granted.

Solicitors for the plaintiffs: *Herbert Turner & Son.*

Solicitors for the defendants: *Corr & Corr.*

S.G.H.