



SUPREME COURT OF VICTORIA

Re DERHAM'S APPLICATION

GAVAN DUFFY, J.

14, 31 October 1960

Covenant—Restrictive covenant—Construction—Covenant “not to erect more than one building”—One building containing separate flats—Property Law Act 1958 (No. 6344), s. 34.

A covenant “not to erect more than one building (other than the usual outbuildings) nor any building which shall not be constructed of brick stone or concrete and which shall not be used for residential purposes only and which shall not have a roof of slates, tiles or shingles” does not prevent the erection of one brick building containing several separate self-contained flats each to be used for residential purposes.

Summons Pursuant to s. 84 of the Property Law Act 1958

A summons was taken out to obtain a declaration that the covenant, the operative words of which are set out in the headnote, *supra*, did not prohibit the erection on a particular building allotment of one building constructed of brick and containing several separate self-contained flats and did not prohibit the use of this building and the flats for residential purposes.

K. A. Aickin, Q.C., and R. K. Fullagar, for the applicant.

L. Voumard, Q.C., and Kevin Anderson, for the five objectors.

Cur. adv. vult.

Gavan Duffy, J., delivered the following written judgment: This summons asks for an order declaring that on its proper construction the covenant therein described does not prohibit the erection on a lot therein described of one building constructed of brick and containing separate self-contained flats and does not prohibit the use of the said building and such said separate self-contained flats for residential purposes.

Mr. Aickin, who appeared for the applicant, requested me to treat the summons as asking whether the covenant in question prohibited the erection of a block of flats. I allowed the necessary amendment of the summons but, it becoming apparent that I was not willing to answer the question in that form favourably to him, he obtained leave to withdraw his application that the summons be amended and, no objection being taken to doing so, I withdrew the amendment or again amended the summons to bring it back again to its original form. A number of cases were referred to which dealt with the question of what was a “dwelling” or “house” or “dwelling-house”, but I did not find them of assistance. I am satisfied that in its ordinary meaning a building which contains a number of independent flats is still only one building.

Mr. Voumard submitted that there was enough in the context to prevent that meaning being given to the words “one building” in the covenant now under consideration. That covenant runs “that he or they will not erect more than one building (other than the usual outbuildings) nor any building which shall not be constructed of brick stone or concrete and which shall not be used for residential purposes only and which shall not have a roof of slates, tiles or shingles”.

5 Mr. Voumard contended that the reference to "the usual outbuild-
ings" made it clear that the building in question was to be a private
dwelling-house, such words not being appropriate to a building contain-
ing a number of self-contained flats; and that the provision that the
10 building must be used for residential purposes only pointed in the same
direction. I cannot accept this submission. All that the language in
question, as it appears to me, means is that if supplementary buildings
are erected there will be a breach of the covenant unless they are usual
outbuildings. I am not prepared to say that outbuildings can never be
15 usual outbuildings if erected in connexion with a building containing
flats and I cannot understand why a building containing flats in which
people reside can be said to be not used for residential purposes.

Mr. Voumard also referred to a roof of slates, tiles or shingles. I sup-
pose shingles would be an unusual roof for a building of flats but surely
15 slates or tiles would not.

Declaration made accordingly.

20 Solicitors for the appellant: *Whiting & Byrne.*

Solicitors for the objectors: *Henderson & Ball.*

F.G.D.

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