SUPREME COURT OF QUEENSLAND

CITATION:	*Leslie v Buttner & Anor* [2022] QSC 131
PARTIES:	**MAXWELL GORDON LESLIE** (applicant) **v** **ROBERT JOHN ALEXANDER BUTTNER AND JANICE ANNE BUTTNER** (first respondents) **SANCTUARY COVE PRINCIPAL BODY CORPORATE GTP 202** (second respondent)
FILE NO/S:	BS 1993 of 2022
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 July 2022
DELIVERED AT:	Brisbane
HEARING DATE:	18 May 2022; 19 May 2022; further written submissions received 25 May 2022 and 26 May 2022.
JUDGE:	Cooper J
ORDERS:	**1. The originating application is dismissed.** **2. The Court will hear the parties as to costs.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – GENERALLY – where the applicant and first respondent own adjoining lots in Sanctuary Cove – where the second respondent is the principal body corporate of Sanctuary Cove – where the second respondent promulgated development control by-laws – where the first respondents' application of proposed works was assessed by the Architectural Review Committee established under the by-laws and ultimately approved by the second respondent – where the by-laws established different types of building controls depending on the designation of a lot under the plan – where the plan identifies the applicant's lot as a Development Parcel but the applicant contends it is a Controlled Aspect Lot – where the applicant alleges that the development approval given by the second respondent is unlawful and of no effect because the proposed work does not comply with the by-laws – whether the by-laws should be construed to classify the first respondents' lot as a Controlled Aspect Lot, a Conventional

Aspect Lot, or a Development Parcel – whether the development approval granted was unlawful – whether the applicant's refusal or failure to agree to amenity measures is a condition precedent to the first respondents being able to undertake work pursuant to the development approval

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INJUNCTIONS FOR PARTICULAR PURPOSES – OTHER CASES – where the applicant and first respondents' lots are governed by the second respondent's development control by-laws – where the applicant seeks mandatory injunctive relief that would require the demolition and removal of the works performed on the western wall of first respondents' house – where the applicant commenced proceedings approximately 6 months after becoming aware of the proposed works – whether any delay in commencing proceedings should weigh against the exercise of discretion to grant injunctive relief – whether significant wasted costs that would be incurred by the first respondents would be disproportionate to the benefit to the applicant of granting the injunction – whether the hardship to the first respondents would be disproportionate to the benefit to the applicant if an injunction was granted – whether the applicant seeks to obtain the benefit of any injunction to compel compliance with the by-laws while refusing to take any steps to address his residence's non-compliance – whether a mandatory injunction should be granted

Acts Interpretation Act 1954 (Qld) s 14A
Building Units and Group Titles Act 1980 (Qld)
Sanctuary Cove Resort Act 1995 (Qld) s 95
Statutory Instruments Act 1992 (Qld) s 7(3)

BGM Projects Pty Ltd v Durmaz Corporation Pty Ltd [2020] QSC 87, applied
Miller v Evans [2010] WASC 127, applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied
The Owners of Strata Plan No 3397 v Tate (2007) 70 NSWLR 344; [2007] NSWCA 207, cited
The Proprietors – Rosebank GTP 3033 v Locke [2016] QCA 192, considered
Zappala Family Co Pty Ltd v Brisbane City Council (2014) 201 LGERA 82, cited

COUNSEL: C Jennings QC, with R Quirk, for the applicant
B Kidston for the first respondents
B Strangman for the second respondent

SOLICITORS: Clinton Mohr Lawyers for the applicant
Mahoneys for the first respondents
Grace Lawyers for the second respondent

Introduction

[1] The applicant and the first respondents own adjoining lots in Sanctuary Cove. The applicant owns Lot 18 on Group Titles Plan 1701 ("Lot 18"). The first respondents own Lot 98 on Group Titles Plan 107499 ("Lot 98"). Lot 18 and Lot 98 are located within a residential precinct at Sanctuary Cove called Bauhinia. The second respondent is the principal body corporate for Sanctuary Cove.

[2] The first respondents obtained development approval from the second respondent to carry out renovation work to the residential building situated on Lot 98. That work involves, among other things, extending that building closer to the common boundary with Lot 18. The applicant alleges that the development approval given by the second respondent is unlawful and of no effect because the proposed work which is the subject of that approval does not comply with the second respondent's Development Control By-Laws ("DCBLs").

[3] At the commencement of the hearing on 18 May 2022, the applicant filed an amended originating application seeking declarations and injunctions to stop the first respondents' renovation works. The injunctive relief sought by the applicant includes an order restraining the first respondents from undertaking further building work which is the subject of the development approval as well as an order requiring the first respondents to remove any building work undertaken pursuant to the development approval or, alternatively, to remove such building work which does not comply with the DCBLs. The amended originating application identifies that work as being: those parts of the residential building situated within 4 metres (or alternatively within 3.5 metres) of the common boundary between Lot 18 and Lot 98; the entry structure of the residential building; and that much of the swimming pool that is within 2.5 metres of the common boundary between Lot 18 and Lot 98. By the time of final addresses, the applicant only pressed that part of the mandatory injunctive relief which related to the extension of the residential building towards the common boundary.

[4] The central issues to be determined in deciding the application are:

(a) whether, on the proper construction of the DCBLs, Lot 98 should be classified as a Controlled Aspect Lot, a Conventional Aspect Lot, or a Development Parcel;

(b) whether, having regard to the proper classification of Lot 98 for the purposes of the DCBLs, the development approval granted by the second respondent was unlawful and of no effect by reason of the work proposed by the first respondents not complying with the DCBLs; and

(c) whether, in the exercise of its discretion, this Court should grant the relief sought by the applicant.

Approval of the proposed building work

[5] The first respondents' application for approval of the proposed works was initially assessed by the Architectural Review Committee ("ARC"), that being a body established under Part 3 of the DCBLs to advise and make recommendations to the second respondent on applications for the approval of plans and specifications for the

construction of buildings or other structures within the relevant part of Sanctuary Cove.

[6] On 14 July 2021, the Executive Architect for the ARC, Mr Jullyan, issued a review of the first respondents' development application for approval. On the basis of that review, on 23 September 2021, the ARC recommended that the second respondent approve the first respondents' application. The second respondent accepted that recommendation and wrote to the first respondents on 14 October 2021 informing them that their application had been approved on certain conditions.

[7] It is common ground that Mr Jullyan's review of the application, the ARC's recommendation to approve and the second respondent's approval of the application were done by reference to a document described as "Bauhinia Adopted Standards" which, the respondents accept, does not form part of the DCBLs.

[8] On 18 February 2022, Mr Jullyan issued a further review of the first respondents' application, assessed against the requirements of the DCBLs on the basis that Lot 98 is designated as a Development Parcel. The ARC considered that further review and wrote to the second respondent on 24 February 2022 recommending that the first respondents' application be approved. On 2 March 2022, the second respondent accepted that recommendation and resolved to approve the first respondents' application.

[9] In those circumstances the second respondent's approval of the application on 2 March 2022 was based upon an assessment of the proposed works against the requirements of the DCBLs and superseded the earlier approval. It is that development approval which is relevant in considering the issues raised for determination on the application.

[10] That development approval, like the earlier approval which was made with regard to the Bauhinia Adopted Standards, was made subject to the following condition:

> "that the [first respondents] be permitted to raise the Rear Terrace Level to 350mm on the basis that the existing privacy of [the applicant] is maintained and that the [first respondents] and [applicant] must agree in writing to the neighbouring fence height or agreed planting to ensure the protection of amenity."

Existing development of lots within the Bauhinia precinct

[11] Before considering the DCBLs it is necessary to note the existing forms of development of lots within the Bauhinia precinct ("Bauhinia Lots").

[12] Each Bauhinia Lot is a waterfront lot with a rear boundary facing the Sanctuary Cove harbour. The Bauhinia Lots are positioned in 13 groups of attached houses that are commonly referred to as Harbour Villas or Harbour Terraces. The 13 groups comprise:

(a) six groups consisting of four attached houses;

(b) one group consisting of five attached houses;

(c) five groups consisting of six attached houses; and

(d) one group consisting of eight attached houses.

[13] Within each group:

(a) the two end houses have one side boundary with zero setback, that being the boundary where the end house is attached to the neighbouring terrace house, and one side boundary with a setback;

(b) the houses within the middle of the group, which are attached to both neighbouring terrace houses, have zero setback on both side boundaries.

[14] Lot 98 is situated at the western end of a group of six attached houses and so has zero setback on its eastern side boundary. It has a setback from its western side boundary which is the common boundary with Lot 18. Lot 18 is situated at the eastern end of a group of four attached houses and has zero setback on its western side boundary and a setback from its eastern side boundary.

The DCBLs

[15] The DCBLs were made by the second respondent,[1] and approved by the Minister for Housing, Local Government and Planning on 18 July 1994.[2] They repealed and replaced earlier development control by-laws which had received ministerial approval and been published in the Government Gazette on 22 August 1987 ("Previous By-laws").

[16] Each of the parties is bound by the DCBLs as if they had signed and sealed them and as if the DCBLs contained mutual covenants to observe and perform all the provisions of those by-laws.[3]

[17] The DCBLs apply to "any building, structure and/or other development only within the Eastern Neighbourhood or Northern Neighbourhood."[4]

[18] The "Eastern Neighbourhood" is defined in cl 1.2 to mean the area designated as such on the "Plan". In turn, the "Plan" is defined to mean, relevantly, the "Eastern Neighbourhood Plan" annexed to the DCBLs. One of the annexures to the DCBLs is a map titled "Eastern Neighbourhood Building Controls" on which the Bauhinia precinct is depicted as a large, undeveloped S shaped block at the top left hand corner. There is no dispute between the parties that this map constitutes the Eastern Neighbourhood Plan, and that the Bauhinia Lots are located within the Eastern Neighbourhood, for the purpose of the DCBLs.

[19] Part 2 of the DCBLs sets out by-laws directed to the control of buildings or other structures to be constructed on lots within the Eastern Neighbourhood. As already noted above, Part 3 of the DCBLs provides for the establishment of the ARC to advise and make recommendations to the second respondent on applications for the approval of plans and specifications for the constructions of such buildings or other structures.

Designation of Lot 98 under the DCBLs

---

1 *Sanctuary Cove Resort Act 1995* (Qld), s 95(1).
2 *Sanctuary Cove Resort Act 1995* (Qld), s 95(5).
3 *Sanctuary Cove Resort Act 1995* (Qld), s 95(7).
4 DCBLs cl 2.1.1.

[20] The building controls which apply to a lot differ depending upon the designation of that lot under the DCBLs. Three different types of lot are relevant here: a Controlled Aspect Lot; a Conventional Aspect Lot; and a Development Parcel. Each of those terms is defined in cl 1.2 of the DCBLs to mean a Lot designated as such in the Plan, that being the Eastern Neighbourhood Plan.

[21] The Eastern Neighbourhood Plan identifies certain Lots as Controlled Aspect Lots, others as Conventional Aspect Lots and others as Development Parcels. The undeveloped S-shaped lot now containing the Bauhinia Lots is identified on the Plan as a Development Parcel. On the express words of the DCBLs then, Lot 98 (along with Lot 18 and the other Bauhinia Lots) forms part of a Development Parcel for the purposes of the DCBLs.

[22] Despite this the applicant contends that, on the proper construction of the DCBLs, Lot 98, and necessarily each of the other Bauhinia Lots, is a Controlled Aspect Lot. That is said to reflect the construction of the DCBLs which best achieves the purpose of prescribing consistent building controls for any building, structure or other development within the Eastern Neighbourhood in circumstances where, since the Plan was prepared, the Bauhinia Lots have been developed and are now used for residential purposes.

[23] The applicant relies upon the fact that the Eastern Neighbourhood Plan contains the notation "Indicative Only" to submit that the designation of lots by that Plan should be treated as being subject to further clarification and identification by the second respondent. In that regard, the applicant relies upon a resolution of the executive committee of the second respondent made on 24 April 2017 that:

> "[W]hilst it does not support the withdrawal of the Stage 1 Precinct Map endorses the adoption of the Stage 1 Mapping Spreadsheet and authorises the ARC to administer all Stage 1 approvals within the guidelines of the Stage 1 Mapping Spreadsheet for all lots with built form which no longer falls within category as identified Stage 1 Precinct Map-Development Parcels, Estate Lots."

[24] Nicole James, a Senior Body Corporate Manager and Building Approvals Administrator who manages and administers the records of the second respondent gave unchallenged evidence that the Stage 1 Mapping Spreadsheet was created by the ARC in response to residents wishing to modernise their homes within the Bauhinia precinct where the classification of those lots as Developments Parcels (and not as Conventional Aspect Lots or Controlled Aspect Lots) resulted in a lack of building controls.

[25] The applicant relies on the fact that, on the Stage 1 Mapping Spreadsheet, Lot 98 is identified as a "Special Lot" with the look and feel of a Controlled Aspect Lot.

[26] The applicant submits that the DCBLs are akin to town planning documents and relies upon authority[5] which establishes that the same principles which apply to statutory construction also apply to the construction of town planning documents. That is, to start and end with the text, seen in its context in the way suggested by the High Court

---

5 *Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at [52] – [58].

in *Project Blue Sky Inc v Australian Broadcasting Authority*.[6] Such documents need to be read in a way which is practical.[7]

[27] The applicant also relies upon section 7(3) of the *Statutory Instruments Act 1992* (Qld) and section 14A of the *Acts Interpretation Act 1954* (Qld) to argue that a purposive approach should be taken to the construction of the DCBLs. There is reason to doubt the correctness of that argument. In *The Proprietors – Rosebank GTP 3033 v Locke*,[8] McMurdo JA observed that, to be a statutory instrument, by-laws must be of a public nature and by-laws of a body corporate, which bind the body corporate, owners, mortgagees, lessees and occupiers, do not have a public function and, consequently, are not instruments of a public nature. Philippides JA and Bond J (as his Honour then was) did not decide that issue.

[28] The respondents argue that the principles which apply in construing the meaning of the DCBLs are those identified by McColl JA in *The Owners of Strata Plan No 3397 v Tate*.[9] They place particular reliance on the principle that caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning, with a tight rein needing to be kept on having recourse to surrounding circumstances.

[29] Ultimately, it is not necessary for me to finally resolve the competing arguments as to the principles which apply to the construction of the DCBLs. That is because even if I were to accept the applicant's argument as to the principles which apply to the interpretation of the DCBLs, I am not satisfied that a construction which treats Lot 98 and the other Bauhinia Lots as having been designated as a Controlled Aspect Lot, or as a Conventional Aspect Lot for that matter, would best achieve the purpose of the DCBLs or the *Sanctuary Cove Resort Act 1995* (Qld) under which those by-laws were made.

[30] The effect of such a construction would be that none of the Bauhinia Lots which comprise an internal lot within one of the 13 groups of attached terrace houses would comply with the side boundary setbacks prescribed by the DCBLs. By clause 2.7.1, a Conventional Aspect Lot is required to have a minimum prescribed setback on both side boundaries. By clauses 2.7.3 and 2.7.4, a Controlled Aspect Lot is required to have a minimum prescribed setback on one of its side boundaries. As already noted, the Bauhinia Lots which are attached to neighbouring terrace houses on both sides have no setback on either side boundary.

[31] The explanation for this appears to be that the construction of the 13 groups of attached houses within the Bauhinia precinct was approved under the Previous By-laws. Clause 1.2.1 of those Previous By-laws expressly contemplated that more than one residential building might be constructed on a Development Parcel. Further, they referred to a "Class II Building" which was defined to mean a residential building containing two or more dwelling units. By clause 1.7.2, where more than one such building was constructed on a Development Parcel, the setbacks between those buildings was prescribed by reference to the mid-point of the distance between them, not by reference to the side boundary of any individual lot.

---

6 (1998) 194 CLR 355 at [69] – [71] and [78].
7 *Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at [56].
8 [2016] QCA 192 at [132] – [133].
9 (2007) 70 NSWLR 344 at [71].

[32] For reasons which are not explained in the evidence, when the second respondent repealed the Previous By-laws and replaced them with the DCBLs there was no longer any reference to Class II Buildings. This did not render the buildings constructed on the Bauhinia Lots unlawful when the DCBLs took effect. Clause 1.1.1 of the DCBLs provides that a design or development which was lawful prior to the replacement of the Previous By-laws continued to be a lawful design or development. However, if the applicant's construction is accepted then, in the event any of the attached houses were, for example, destroyed by fire and required reconstruction, the requirements for minimum side setbacks on one side of each lot, if they are characterised as Controlled Aspect Lots, or on both sides of each lot, if they are characterised as Conventional Aspect Lots, would mean that the houses could not be reconstructed in their previous attached form and would instead have to be constructed as smaller, detached houses. It seems unlikely to me that, considered objectively, the drafter of the DCBLs intended such an outcome.

[33] A further indication that the Bauhinia Lots were not intended to be designated as either Controlled Aspect Lots or Conventional Aspect Lots can be found in clause 2.1.2 of the DCBLs. That clause provides:

> "2.1.2 Except where:
>
> (a) a Development Parcel is substantially subdivided before any development occurs on the Development Parcel; or
>
> (b) there is reference only to a Lot in a By-law and no reference to a Development Parcel,
>
> In which case these By-laws apply to each subdivided Lot as if they were referred to as Lots within these By-laws, these By-laws only apply to a Development Parcel as a whole Lot and not to any subdivided Lots in the Development Parcel."

[34] The applicant submitted that there is a clear formatting error in this clause which renders the clause incoherent if it is given a literal meaning. On the applicant's argument, the clause should be construed as if it read as follows:

> "2.1.2 Except where:
>
> (a) a Development Parcel is substantially subdivided before any development occurs on the Development Parcel;
>
> In which case these By-Laws apply to each subdivided Lot as if they were referred to as Lots within these By-laws,
>
> (b) there is reference only to a Lot in a By-law and no reference to a Development Parcel,
>
> these By-laws only apply to a Development Parcel as a whole Lot and not to any subdivided Lots in the Development Parcel."

[35] I do not accept that clause 2.1.2 contains a formatting error or that it should be construed in the manner the applicant proposes. In my view, the clause should be construed as establishing the following position with respect to the application of the DCBLs to lots within areas designated as a Development Parcel on the Eastern Neighbourhood Plan:

(a) the default position is that the DCBLs only apply to a Development Parcel as a whole Lot and not to any subdivided Lots in the Development Parcel;

(b) two exceptions to that default position are identified in sub-clauses (a) and (b). Where either of those exceptions applies, the DCBLs apply to each subdivided Lot within a Development Parcel as if they were referred to as Lots within the DCBLs.

[36] Read in that way the clause appears to evince an intention that when a Development Parcel is subdivided, including into lots to be used for residential purposes, the subdivided lots retain the designation in the Plan as part of a Development Parcel, but that the DCBLs are to be applied to those subdivided lots in accordance with the exceptions set out in sub-clauses (a) and (b) of clause 2.1.2. Conversely, there does not appear to be any intention that the DCBLs should be applied to those subdivided lots on the basis that their designation in the Plan should be treated as having changed from being part of a Development Parcel to being a Controlled Aspect Lot or a Conventional Aspect Lot.

[37] This does not mean that development of the Bauhinia Lots is entirely unconstrained by the DCBLs.

[38] A number of clauses within the DCBLs make no reference to a Development Parcel and, consistently with the exception provided for in clause 2.1.2(b), would apply to the subdivided lots within a Development Parcel, including the Bauhinia Lots. These clauses include: clause 2.3 (Height Controls); clause 2.4 (Site Coverage Controls); clause 2.12 (Exterior Materials and Colour Controls); clause 2.13 (Tennis Courts); clause 2.14 (Screened Enclosures); clause 2.15 (General Conditions); clause 2.16 (Swimming Pools); clause 2.17 (Landscape Controls); clause 2.18 (General Restrictions); and clause 2.19 (Security).

[39] Other clauses contain parts which should be applied only to a Development Parcel as a whole and other parts which, giving a practical interpretation to clause 2.1.2, can properly be applied to the subdivided lots within the Development Parcel. An example is clause 2.2 which addresses Principal Structures (being a residential dwelling) and provides as follows:

> "**2.2 Principal Structures**
>
> 2.2.1 Only one Principal Structure may be erected on a Residential Lot.
>
> 2.2.2 No more than two Principal Structures may be erected on an Estate Lot.
>
> 2.2.3 The maximum number of Principal Structures that may be erected on a Development Parcel must not exceed the Development Parcel's Lot entitlement specified in the relevant Registered Plan creating the Development Parcel."

[40] Clearly clause 2.2.3 comes within the default position established by clause 2.1.2 and would only apply to the Development Parcel as a whole Lot and not to any subdivided lots within that Development Parcel. That conclusion does not mean, however, that the exception in clause 2.1.2(b) could not be engaged so that clause 2.2.1, which makes no reference to a Development Parcel, would apply to any subdivided lot within a Development Parcel which came within the definition of a "Residential Lot".

[41] In my view, the Bauhinia Lots do come within that definition which provides as follows:

> "Residential Lot means:
>
> (a) any Lot within the Eastern Neighbourhood or Northern Neighbourhood; and
>
> (b) used, or to be used, for residential purposes,
>
> other than an Estate Lot or Development Parcel."

[42] The Bauhinia Lots are Lots within the Eastern Neighbourhood which are used for residential purposes. I regard the reference to Development Parcel in the exclusion from that definition to be a reference to the Development Parcel as a whole Lot, not to any subdivided lots within that Development Parcel. That is, a Development Parcel when considered as a whole Lot does not come within the definition of Residential Lot, but subdivided Lots within that Development Parcel which otherwise meet the requirements of the definition do come within in it. I do not accept the applicant's submission that a construction which treats the designation of the S-shaped block as a Development Parcel in the Plan as having continuing effect would exclude the Bauhinia Lots from falling within the definition of Residential Lot.

[43] When the definition of Residential Lot and the various parts of clause 2.2 are construed in the manner I have identified, clause 2.2 can be given a sensible operation which would act to constrain development on the Bauhinia Lots.

[44] The same analysis would, in my view, apply to:

(a) clause 2.5 (Floor Space Ratio Controls) where references to a Development Parcel are only applied to the Development Parcel as a whole Lot, but references to Residential Lots are applied to subdivided Lots within the Development Parcel and come within the definition;

(b) clause 2.6 (Thoroughfare Alignment and Building Line Controls) where the express reference in clause 2.6.3 would mean that part of the clause would only apply to the Development Parcel as a whole Lot, but the absence of any reference to a Development Parcel in clauses 2.6.1, 2.6.2 and 2.6.4 means that those parts of the clause would apply to the subdivided Lots within the Development Parcel;

(c) clause 2.8 (Rear Boundary Building Line Controls) where the express reference in what should be clause 2.8.1(c), but has been misnumbered as a second clause 2.8.1(a), would mean that part of the clause would only apply to the Development Parcel as a whole Lot, but the absence of any reference to a Development Parcel in clauses 2.8.1(a) and (b), 2.8.2, 2.8.3 and 2.8.4 means

that those parts of the clause would apply to the subdivided Lots within the Development Parcel;

(d) clause 2.9 (Parking and Driveway Controls) where the express reference in clause 2.9.3 would mean that part of the clause would only apply to the Development Parcel as a whole Lot, but the absence of any reference to a Development Parcel in clauses 2.9.1, 2.9.2, 2.9.4, 2.9.5 and 2.9.6 means that those parts of the clause would apply to the subdivided Lots within the Development Parcel;

(e) clause 2.11 (Fence Controls) where the express reference in clause 2.11.6(b) would mean that part of the clause would only apply to the Development Parcel as a whole Lot, but the absence of any reference to a Development Parcel in clauses 2.11.3, 2.11.4, 2.11.5, 2.11.6(a), 2.11.7 and 2.11.8 means that those parts of the clause would apply to the subdivided Lots within the Development Parcel.

[45] One clause that is important in the context of this application, and which cannot be given this sort of practical application to the subdivided Lots of a Development Parcel is clause 2.7. That clause prescribes setbacks from side boundaries of different types of Lots. Clauses 2.7.1 and 2.7.2 address Conventional Aspect Lots and Estate Lots as well as a Development Parcel. The exception in clause 2.1.2(b) consequently does not apply. Clauses 2.7.3, 2.7.4 and 2.7.5 are addressed only at Controlled Aspect Lots. In those circumstances, clause 2.7 would only operate to impose setback controls on the subdivided Lots of a Development Parcel if the exception in clause 2.1.2(a) was engaged.

[46] In this case, that exception would only be engaged if the Development Parcel was substantially subdivided into the Bauhinia Lots before any development occurred on the Development Parcel. Expressed a different way, the exception would only be engaged in circumstances where no development had occurred on the Development Parcel before it was substantially subdivided into the Bauhinia Lots.

[47] The evidence establishes that not to be the case. The relevant Group Titles Plan No 1701, by which the Development Parcel was subdivided into the Bauhinia Lots, was registered on 13 August 1987. A search conducted with the City of Gold Coast in relation to Lot 98 establishes that the dwelling on that lot:

(a) received building approval on 16 December 1985;

(b) had its footings and slab inspected and approved on 5 June 1986;

(c) had its frame inspected and approved on three occasions: 17 July 1986, 24 November 1986 and 18 February 1987; and

(d) had its final building inspection on 31 August 1987.

[48] The construction of the dwelling on Lot 98, which commenced some time between 16 December 1985 and 5 June 1986 and continued up to the date Group Titles Plan No 1701 was registered, constitutes development occurring on the Development Parcel before it was substantially subdivided into the Bauhinia Lots. I do not accept the applicant's submission that I should be satisfied that the exception in clause 2.1.2(a) applies, and the DCBLs apply to each of the Bauhinia Lots as if they were referred to as Lots within the DCBL, because the construction of the dwelling on Lot

98 did not receive final building approval before Group Titles Plan No 1701 was registered. That submission ignores the reference to "any development" in clause 2.1.2(a). It is also a submission that is made without any evidence as to the timing of construction of dwellings on Bauhinia Lots other than Lot 98. I am not prepared to infer that other construction undertaken on the Development Parcel did not receive final building approval before substantial subdivision into the Bauhinia Lots occurred. To the contrary, on the available evidence I am satisfied that development occurred on the Development Parcel before it was substantially subdivided into the Bauhinia Lots such that the exception in clause 2.1.2(a) does not apply.

[49] The consequence is that, on the view I have taken, clauses 2.7.1 to 2.7.5 of the DCBLs do not operate to prescribe any minimum setback from the side boundaries of the Bauhinia Lots. While this might appear surprising, the inconsistency between the side boundary setbacks prescribed in those clauses and the side boundary setbacks of the buildings which presently exist on many of the Bauhinia Lots (referred to in [30] above) provides what I consider to be an objectively sensible explanation for why the drafter of the DCBLs would not have intended that the Bauhinia Lots be subject to clauses 2.7.1 to 2.7.5.

[50] One further clause of the DCBLs should be noted. Clause 3.12.2 provides:

> "The ARC may refuse to consider any application, where, in its opinion, the construction, alteration or addition:
>
> (a) would adversely affect the amenity or the likely amenity of the neighbourhood or adjoining Lots; or
>
> (b) would result in the aesthetics of the building or other structure not being in keeping with the character of the neighbourhood or adjoining Lots."

[51] That clause refers to Lots but makes no reference to a Development Parcel and, by reason of clause 2.1.2(b), applies to the Bauhinia Lots as if they were referred to as Lots in the DCBLs. On that basis the first respondents submit, and I accept, that the discretion conferred on the ARC provides a means for the regulation of the setbacks between the end houses of the 13 groups in the Bauhinia precinct. While that regulation is not as prescriptive as the terms of clauses 2.7.1 to 2.7.5 it nevertheless fulfils the purpose of controlling development, in the form of construction, alterations or additions, in the Eastern Neighbourhood and, in my view, is to be preferred to the inconsistency inherent in the construction for which the applicant contends, between the side boundary setback requirements of the DCBLs and the existing attached terrace houses on the Bauhinia Lots.

[52] For the reasons set out in [29] to [51] above, the application for the relief sought in paragraph 1 of the amended originating application must be dismissed.

Compliance with the DCBLs

[53] The applicant challenges the lawfulness and effectiveness of the development approval on the basis that such approval was beyond the power of the second respondent in circumstances where the work it approved did not comply with the DCBLs.

[54] The applicant identifies three features of the approved building work as not complying with the DCBLs:

(a) the thoroughfare alignment or front setback;

(b) the side boundary setbacks; and

(c) the swimming pool setback.

Front setback

[55] Clause 2.6.1, which applies to the Bauhinia Lots on the construction of the DCBLs I have adopted in [29] to [51] above, relevantly provides:

> "The minimum Building Line for a Principal Structure on a Lot must not be less than:
>
> …
>
> (b) 6.0 metres to the outer face of the street-facing wall from the Thoroughfare Alignment, where the thoroughfare is at the point not less than 16 metres wide and not more than 18 metres wide;"

[56] The term "Principal Structure" is defined in clause 1.2 of the DCBLs to mean:

> "… a building designed, constructed or adapted for activities normally associated with domestic living of a maximum of one Sole-occupancy Unit and one Family Accommodation and:
>
> (a) includes:
>
> (i) all normal interior floor areas; and
>
> (ii) attached verandahs, decks, balconies, porches, garages and similar structures; but
>
> (b) excludes Class 10 Buildings."

[57] The term "Class 10 Building" is defined in clause 1.2 to mean:

> "… a non habitable building or structure including a carport, garage, shed, pergola, shade structure or similar structure."

[58] The building work approved by the second respondent includes the construction of what is referred to in the evidence as a "gatehouse". This gatehouse is a portico structure located at the commencement of the path leading to the front door of the residence. That is, it is a structure which a person would pass through when walking from the street through into a courtyard and then to the front door of the residence. The setback from the front boundary of Lot 98 to the gatehouse is 5.445 metres.

[59] Mr Curtis, an architect called by the applicant, gave evidence that this gatehouse is a "porch" or a similar structure for the purposes of the definition of Principal Structure. He also considered that the gatehouse is attached to the Principal Structure for the purposes of the definition because it is connected by means of a fence or wall which extend from either side of the gatehouse to the front corner of garages situated on either side of the front of the house. For those reasons, Mr Curtis considered that the

front setback of the Principal Structure (including the attached gatehouse) did not comply with the 6.0 metre requirement in clause 2.6.1(b) of the DCBLs.

[60] Mr Jullyan, who is the Executive Architect for the ARC and was called by the second respondent, gave evidence that the gatehouse was a Class 10 Building and so was excluded by the definition from being considered part of the Principal Structure.

[61] The Compact Oxford English Dictionary (2nd edition) defines the relevant words used in sub-clause (a)(ii) of the definition of Principal Structure as follows:

(a) verandah: "a roofed platform along the outside of a house, level with the ground floor";

(b) balcony: "an enclosed platform on the outside of a building, with access from an upper-floor window or door";

(c) porch: "a covered shelter projecting over the entrance to a building".

[62] A deck, in the sense used in the DCBLs, would have a meaning similar to balcony.

[63] These types of structures share characteristics in terms of function and connection to the main residence which, in my view, are not features of the gatehouse.

[64] In terms of function, Mr Curtis accepted that a structure such as a verandah, a deck, a balcony or a porch is one where a person might undertake activities normally associated with domestic living such as spending time sitting and eating, talking, reading or the like. Mr Curtis also accepted that it is unlikely a person would undertake any of those activities in the first respondents' gatehouse.

[65] In terms of connection to the main building, an important feature of the types of structures referred to in sub-clause (a)(ii) of the definition of Principal Structure, including an attached garage, is that the footprint of those structures is likely to be defined on one side by the wall of the main residence itself. Further, those structures are likely to include direct access from and into the main residence by means of a connecting door. The reference to garage in both the definition of Principal Structure and the definition of Class 10 Building reflects the fact that some houses will feature a garage with that significant degree of connection and direct access into the house while other houses will have a garage with a greater degree of separation and no direct access from the garage into the house. The former type is an attached garage and, pursuant to sub-clause (a)(ii) of the definition, will form part of the Principal Structure. The latter type is a Class 10 Building and, pursuant to sub-clause (b) of the definition, will be excluded from the Principal Structure.

[66] The first respondents' gatehouse does not exhibit the degree of connection to the house which, in my view, is required for it to be characterised as a structure which is attached for the purposes of the definition of Principal Structure. None of the walls of the gatehouse are contiguous with any wall of the house or the walls of the garages. The fences or walls which form the front of the courtyard connect at a single point on each of the side walls of the gatehouse where the courtyard walls intersect with the walls of the gatehouse. As a consequence of this limited degree of connection, there is no direct access from the gatehouse to the house itself.

[67] For these reasons, I am not persuaded that the gatehouse is an attached structure within sub-clause (a)(ii) of the definition of Principal Structure. It is a Class 10 Building and is therefore excluded from forming part of the Principal Structure.

[68] On that basis, the applicant has not established any non-compliance with clause 2.6.1 of the DCBLs.

[69] For completeness I note that clause 2.6.2, which applies to the Bauhinia Lots on the construction of the DCBLs I have adopted in [29] to [51] above, requires a minimum setback of 4.0 metres from the front boundary of Lot 98 for a Class 10 Building. The setback of the first respondents' gatehouse meets that requirement.

Side setback

[70] Mr Curtis was instructed to assess the first respondents' proposed work for compliance against clauses 2.7.1 and 2.7.2 (on the basis that Lot 98 is designated as either a Conventional Aspect Lot or a Development Parcel) and also against clauses 2.7.3 to 2.7.5 (on the basis that Lot 98 is designated as a Controlled Aspect Lot).

[71] As set out in [29] to [51] above, I have concluded that none of clauses 2.7.1 to 2.7.5 apply to the Bauhinia Lots as individual lots. On that basis, it is not necessary for me to address a difference between the evidence of Mr Curtis and Mr Jullyan as to the manner in which the setback from the side boundary of the proposed work should be calculated for the purpose of those clauses.

[72] The ARC did not exercise its discretion under clause 3.12.2 to refuse to consider the first respondents' application for approval on the basis that the construction would adversely affect the amenity of the neighbourhood or Lot 18. To the contrary, it recommended that the second respondent approve the application, and approval for the work was given.

[73] That course is consistent with Mr Jullyan's evidence that the proposed work would not have a significant effect on the amenity of Lot 18. I prefer that evidence to the evidence of Mr Curtis which relies upon his conclusion that the work was not compliant with clause 2.7 of the DCBLs.

[74] A further matter relevant to the assessment of the impact of the first respondents' work on the amenity of Lot 18 is the setback of the applicant's house from the side boundary it shares with Lot 98. The evidence establishes that part of the applicant's house has a setback of only 1.6 metres from that shared side boundary. In cross-examination, the applicant accepted this as being correct.[10] That setback from the side boundary is not substantially different to the proposed setback of the first respondents' house upon completion of the proposed work on Lot 98. I accept the evidence of Mr Jullyan that the proximity of the applicant's house to the shared side boundary would contribute to any lack of amenity for Lot 18. The applicant accepted as much in cross-examination.[11] For that reason, I do not consider the first respondents' construction could be characterised as non-compliant with the DCBLs by reason of its impact on the amenity of Lot 18.

---

10 Transcript 2-8.
11 Transcript 2-37.

[75] On that basis, the applicant has not demonstrated any non-compliance with clause 2.7 of the DCBLs or that the proposed work is otherwise non-compliant by reason of the setback from the side boundaries.

Swimming pool setback

[76] Clause 2.16.1 of the DCBLs, which applies to the Bauhinia Lots on the construction of the DCBLs I have adopted in [29] to [51] above, provides:

> "Swimming pools, as measured to the water's edge within the pool, must be:
>
> (a) no closer than 1.5 metres to a side and rear boundary except where such boundaries abut a body of water where the distance shall be 2.5 metres measured to the boundary or revetment wall, whichever is closer; …"

[77] The side boundaries of Lot 98 extend northwards into the waters of the Sanctuary Cove harbour so as to permit the construction of a jetty over part of the harbour contained within the rear section of the lot.

[78] Prior to the proposed work, Lot 98 had a swimming pool which was aligned with its long sides parallel to the shared side boundary with Lot 18 and had a setback of 1.5 metres from that boundary. The proposed work involves realigning the swimming pool so that its long sides will run perpendicular to the shared side boundary, but it retains a setback of 1.5 metres from that boundary.

[79] Mr Curtis gave evidence that, because the side boundaries of Lot 98 extend northwards into the water at the rear of the lot, he considers that those side boundaries abut a body of water. On that basis, he says that the first respondents' swimming pool is required to have a setback of 2.5 metres from the shared side boundary with Lot 18. I am unable to accept that interpretation of clause 2.16.1.

[80] The Compact Oxford English Dictionary (2nd edition) defines the word abut to mean "to be next to or share a boundary with".

[81] In my view, the side boundaries of Lot 98 do not abut the water of the harbour in that sense. It would be more apt to say that the western side boundary of Lot 98 intersects with, or extends into, that water. At the proposed location of the first respondents' swimming pool, the western side boundary is not next to the water of the harbour. It is next to, and shares a boundary with, land which forms part of Lot 18. For the purposes of clause 2.16.1, the western side boundary abuts that land. It does not abut the water.

[82] This construction is consistent with Mr Jullyan's evidence, which I accept, that the purpose of clause 2.16.1 is to take account of engineering considerations which arise if excavation for a swimming pool is undertaken within the sphere of influence of a body of water. Mr Curtis' interpretation would do nothing in terms of better addressing those engineering considerations. If a 2.5 metre set back from the shared western side boundary was to be imposed, and the pool was to be constructed one metre further to the east, the first respondents' swimming pool would be no further away from the water which is located to the north, at the rear of Lot 98.

[83] For these reasons, the applicant has not demonstrated any non-compliance with clause 2.16.1.

[84] Mr Curtis also gave evidence that the proposed location for the pool pump did not comply with clause 2.16.3 of the DCBLs, being within 2 metres of the common boundary with Lot 18. Although this was an issue pleaded in the applicant's points of claim, it was not addressed in the applicant's closing address. The location of the pool pump under the proposed work is to be the same as the location of the pool pump for the previous pool. On that basis, during his cross-examination, the applicant expressly disavowed reliance upon that issue as an aspect of non-compliance with the DCBLs.[12]

Failure to comply with condition precedent

[85] In his points of claim, the applicant refers to the condition set out in [10] above as a condition precedent and asserts that the first respondents have not, and will not, satisfy that condition precedent because the applicant has not, and will not, give his agreement to any amenity measures for the proposed rear terrace to be constructed on Lot 98. In his cross-examination, the applicant stated his understanding that the agreement referred to in the condition had to be made before the commencement of any works could commence.[13]

[86] That position needs to be understood in light of attempts that were made by the second respondent to facilitate a meeting between the applicant and the first respondents to try and reach agreement on the amenity measures referred to in the condition.

[87] On 7 September 2021, the second respondent invited the applicant to attend a meeting with the first respondents and the chairperson of the ARC to discuss the development application. No meeting occurred at that time.

[88] On 21 October 2021, the second respondent again invited the applicant to attend a meeting to discuss the matters referred to in the condition set out in [10] above. The applicant declined to participate in that meeting on the basis that he wished to have the opportunity to review plans of the proposed redevelopment of Lot 98 and to consider the potential impacts on the amenity of Lot 18.

[89] The inability of the first respondents to satisfy the condition concerning the raising of the level of the rear terrace does not render the whole of the development approval unlawful or of no effect.

[90] Further, that condition should not be interpreted as preventing work being undertaken in circumstances where the applicant has acted unreasonably in refusing to agree to any amenity measures. The position the applicant has taken in his points of claim – that he has not agreed, and will not agree, to amenity measures – indicates that he will not give reasonable consideration to proposals that the first respondent might make concerning amenity measures. When that part of the points of claim was shown to him in cross-examination the applicant responded by saying that he had not really turned his mind to measures that would fulfil the condition because he believed that there were other major issues with the development application which had to be

---

12 Transcript 2-17 – 2-18.
13 Transcript 2-15, 2-26 and 2-31.

considered further.[14] In my view, the applicant is withholding his agreement in an attempt to prevent the first respondents from undertaking any of the proposed works.

[91] For those reasons, I do not consider that the failure or refusal of the applicant to agree to amenity measures in respect of the raising of the rear terrace level prevents the first respondents from undertaking work pursuant to the development approval.

Conclusion on status of Development Approval

[92] The applicant's challenge to the lawfulness and effectiveness of the development approval is based on his assertion that the works which are the subject of that approval do not comply with the DCBLs. For the reasons set out above, the applicant has failed to establish that the approved works do not comply with the DCBLs. On that basis, the application for the relief set out in paragraphs 3 to 6 of the amended originating application must be dismissed.

Exercise of discretion

[93] In the event my views about the designation of Lot 98 under the DCBLs or the question of non-compliance with the DCBLs is wrong I will set out my conclusion on the exercise of discretion if I had found that the Development Approval was unlawful and of no effect.

[94] The principles which apply to the exercise of the Court's discretion where a mandatory injunction is sought to enforce building covenants were recently considered by Brown J in *BGM Projects Pty Ltd v Durmaz Corporation Pty Ltd*.[15] Her Honour referred to a summary of those principles by Hall J in *Miller v Evans*.[16]

[95] In essence, the hardship that would be caused to the applicant by the refusal of an injunction has to be weighed against the hardship that would be caused to the first respondents by the grant of an injunction. Nevertheless, the authorities recognise that the normal remedy for the breach of a restrictive covenant is an injunction and the court's power to award damages in lieu of an injunction should be exercised with caution. Although the occasioning of hardship to a person in the position of the first respondents is a relevant consideration in the exercise of the discretion to grant an injunction, the mere fact of hardship will not be sufficient. Hardship will usually only justify refusal of a mandatory injunction if the hardship that would be inflicted on the first respondents would be disproportionate to the benefit to the applicant of granting the injunction. A further relevant factor is the extent of the first respondents' knowledge that their acts were in breach of the DCBLs (if I had found that to be the case).

[96] The applicant became aware of the first respondents' application for development approval at about the end of July 2021.

[97] On 19 August 2021, he sent an email to the Senior Body Corporate Manager for the second respondent asking for information about the proposed development. It

---

14 Transcript 2-30.
15 [2020] QSC 87.
16 [2010] WASC 127 at [24] – [29].

appears that the second respondent did not provide any information in response to that request.

[98] On 7 September 2021, the applicant received an email from the Senior Body Corporate Manager informing him that the second respondent had approved the application in principle subject to the condition set out in [10] above. The email attached a copy of the Bauhinia Adopted Standards. The applicant then engaged in further correspondence with the second respondent in the second half of October 2021 raising concerns regarding the validity of the Bauhinia Adopted Standards as the controls against which the development application was to be assessed.

[99] On 12 November 2021, the applicant filed an application under the *Building Units and Group Titles Act 1980* (Qld). The application sought an order that the second respondent provide the applicant with documentation relevant to the proposed redevelopment of Lot 98.

[100] On 2 December 2021, the second respondent wrote to the applicant attaching a form to request a search of the second respondent's records. The applicant deposed, and I accept, that this was the first occasion on which the second respondent had made him aware of the ability to request a search of the records of the second respondent in this manner. The applicant then completed the relevant search request form and, on 20 December 2021, attended the offices of the second respondent where he inspected and made copies of the documents upon which he relies in bringing these proceedings.

[101] On 29 December 2021, the applicant's solicitors wrote to the first respondents stating that their proposed development would adversely affect the applicant's amenity, that the work failed to comply with the DCBLs and that the second respondent's approval of the work was invalid and of no force or effect. An undertaking was sought from the first respondents not to carry out the proposed works, failing which it was said the applicant would commence proceedings. The first respondents did not provide any undertaking.

[102] On 20 January 2022, the applicant's solicitors sent to the first respondents a copy of a letter to the solicitors for the second respondent which raised the issues of noncompliance with the DCBLs, adverse impact of amenity and the invalidity of the approval.

[103] On 14 February 2022, the applicant's solicitors sent a further letter to the first respondents stating that there appeared to be preparatory steps being undertaken on Lot 98 in relation to the proposed works. A further request was made for the first respondents to provide an undertaking not to carry out any works until the validity of the approval had been determined, failing which an urgent application would be made. Again, the first respondents did not provide any undertaking. The first respondents commenced construction of the proposed works shortly thereafter.

[104] The applicant commenced these proceedings on 18 February 2022. I do not accept the first respondents' submission that the time the applicant took in obtaining relevant documentation and then in commencing proceedings amounts to delay which should weigh against the exercise of discretion to grant injunctive relief.

[105] Mr Buttner and Mr Miller have given evidence as to the costs incurred by the first respondents that will be wasted if the mandatory injunctions sought by the applicant

are granted. Those costs are considerable. Mr Buttner's affidavit exhibits invoices for architects, engineers and consultants totalling approximately $40,000 which, I accept, will be largely wasted if the relief sought by the applicant is granted and the proposed works need to be substantially redesigned. Mr Miller, the builder contracted to perform the work, has provided estimates of the costs that will be incurred by the first respondents if different aspects of the proposed work were required to be demolished and reconstructed. He was not required for cross-examination. His estimate of the costs of changing the western wall of the house, which I accept as being a reasonable estimate, exceeds $400,000. As the applicant only presses for relief in the form of a mandatory injunction in relation to that western wall it is unnecessary to say anything about Mr Miller's estimates of the costs associated with other aspects of the proposed works.

[106] Applying the relevant principles, I would not have been prepared to exercise the discretion in favour of granting a mandatory injunction which would have the effect of requiring the demolition and removal of the works performed on the western wall of the house on Lot 98. I have referred in [73] above to the limited impact the proposed works will have on the applicant's amenity. The applicant has not put on any evidence as to any diminution in the value of Lot 18 that would be caused if the works are undertaken. In those circumstances, the significant wasted costs that would be incurred by the first respondents would be disproportionate to the benefit to the applicant of granting the injunction. The fact that the applicant notified the first respondents that he disputed the validity of the approval does not alter my view on the exercise of the discretion to grant injunctive relief.

[107] There is a further consideration raised by the facts of this case that is relevant to the exercise of the discretion to grant injunctive relief. As already referred to in [74] above, the house on Lot 18 was extended in 2002 with the result that the minimum setback from the common boundary with Lot 98 was reduced to 1.6 metres. The requirements against which the extension of Lot 18 was assessed is not clear from the evidence. However, by that time the DCBLs had replaced the Previous By-laws. If the applicant's submission that Lot 98 should be classified under the DCBLs as a Controlled Aspect Lot was to be accepted then Lot 18 would have to be given the same classification. In that event, the extension to the house undertaken in 2002 would not comply with the setback requirements in clause 2.7.4 of the DCBLs and the approval for those extension works would, on the applicant's own case, be invalid and of no effect. The applicant accepted as much when giving evidence.[17] Despite this, the applicant confirmed when giving evidence that he was not prepared to undertake any rectification work on his own house to bring it into compliance with what he now says are the requirements that apply to the work being undertaken on Lot 98.[18]

[108] In this way, the applicant seeks to obtain the benefit that would follow from the grant of an injunction to compel compliance with the DCBLs while himself refusing to take any steps to address his own residence's non-compliance with the DCBLs (if Lot 18 is classified as a Controlled Aspect Lot). The applicant's response when this issue was pointed out to him during his evidence was to assert, in effect, that the fact that his house was extended some time ago, while the first respondents' extension is still

---

17 Transcript 2-42.
18 Transcript 2-33 – 2-34.

being constructed, meant that the situations were different.[19] In closing submissions, the counsel for the applicant also relied on the fact that the applicant purchased Lot 18 after the relevant extension had been undertaken.[20] Although that is true, it does not alter the fact that the applicant is seeking discretionary relief designed to compel compliance by the first respondents with the requirements of the DCBLs while refusing to take any steps to make his own property compliant with those same requirements. This serves to reinforce my view that the costs to the first respondents if injunctive relief is granted would be disproportionate to the benefit to the applicant of granting the relief.

Conclusion

[109] The originating application should be dismissed. I will hear the parties as to costs.

---

19 Transcript 2-34 and 2-42.

20 Transcript 2-74.