

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2023-404-2171
[2023] NZHC 2874**

IN THE MATTER of Part 19 of the High Court Rules 2016 and
ss 316 - 317 of the Property Law Act 2007

AND

IN THE MATTER of an application FAIRVIEW ESTATE
INVESTMENT LIMITED
Application

Hearing: On the papers

Appearances: SE Wroe for the Applicant

Judgment: 13 October 2023

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 13 October 2023 at 4.00pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Psalms Law, Auckland

To: S Wroe, Auckland

Introduction

[1] Fairview Estate Investment Limited (Fairview) is a property developer who is in the process of subdividing a property at 6 McMenemy Place, Auckland.¹ The subdivision will contain 18 lots; 16 will be residential, and two will vest in the Auckland Council as local purpose reserves (the Reserve Lots).² Fairview applies under the Property Law Act 2007 to have a covenant that burdens the entire property extinguished insofar as it relates to the two Reserve Lots. The covenant prohibits the owners of the burdened land (which includes the property) from objecting to the subdivision and development of neighbouring land.

Factual background

The Covenant

[2] The property was created by the subdivision of a larger piece of land originally owned by HY Development Ltd (HYD) (the HYD land).³ The HYD land bordered a property owned by Stanley and Raymond Ulyate (the Ulyate title).⁴

[3] On 10 August 2008, a covenant was registered against the HYD land that required the current and future owners of the HYD land (which I will refer to as “the burdened land”) to agree not to object to the development and subdivision of the land contained in the Ulyate title (which I will refer to as “the benefited land”).⁵

[4] The covenant reads:

2 Covenants

The Covenantors hereby covenant, acknowledge and agree with the Dominant Land Owner that the Covenantors will henceforth and at all times hereafter observe and perform the following stipulations and restrictions to the end and intent that each of the stipulations and restrictions shall, in the manner and to the extent prescribed, forever enure for the benefit of, and be appurtenant to, the whole of the Dominant Land from time to time:

¹ 6 McMenemy Place has the record of title 446922 Lot 66 Deposited Plan 411252.

² The creation of the local purpose reserves is required under the Reserves Act 1977 and the Resource Management Act 1991.

³ The HYD land had the records of title NA59A/979 and NA52A/243.

⁴ The Ulyate title was contained in the record of title 235933, DP 11, DP257939.

⁵ The covenant is registered under Easement Instrument 8024143.4.

- 2.1 The covenantors hereby agree that they shall not lodge, permit to be lodged or support the lodgement with the relevant authority of any objection to the subdivision and development of the dominant land by the dominant landowner.
- 2.2 The covenantors hereby covenant that they shall at all times hereafter save harmless and keep indemnified the dominant landowner from all proceedings, costs, claims and demands in respect of breaches by the covenantors of the covenants and restrictions herein contained and implied on behalf of the covenantors which occurred while the covenantors were the registered proprietor of the covenanting land.

[5] Since the creation of the covenant in 2008, the Ulyate title has been subdivided into 28 lots: 26 residential lots and two local purpose reserves. The HYD land was also subdivided, with the creation of 36 new titles, including 6 McMenamin Place.

[6] Despite these developments, the covenant continues to run with both the burdened and benefited land. This accordingly means that the owners of the now subdivided Ulyate title continue to retain the benefit of the covenant, while the owners of the subdivided HYD land, including 6 McMenamin Place, are burdened by it.

The Fairview Subdivision

[7] On or about 14 June 2023, Fairview's lawyers lodged the documentation to acquire new titles for the subdivision of 6 McMenamin Place. This was rejected by Land Information New Zealand (LINZ) on 28 June 2023. LINZ provided the following instruction:

Have the covenantees in Land Covenant 8024143.4 consent to the vesting of Lots 19 and 20 LT 578914 as Local Purpose (Esplanade) Reserve or lodge a revocation of the covenant as to those lots.

[8] Having received that correspondence, Fairview instructed its solicitor to approach Auckland Council to see if it would agree to taking the Reserve Lots subject to the covenant. Auckland Council did not agree. Accordingly, Fairview would need to obtain the consent of all the owners and mortgagees of the benefited land to remove the covenant by consent. That would obviously be a time-consuming endeavour.

[9] The sale and purchase agreements in place for subdivision of 6 McMenamin Place contain an extended sunset date of 1 November 2023. If new titles are not issued by that date, purchasers will have the ability to cancel the agreements. Fairview was of the view that it could not acquire the consent of all the relevant parties before the sunset date. Instead, it elected to apply to the Court to extinguish the covenant, though only on the two Reserve Lots to vest in Council.

[10] Fairview then instructed its solicitor to write to all the owners of the benefited land inviting them to advise of any objections to the application and to indicate if they wish to be served with a copy of the proceedings. A process server was engaged for that purpose and an affidavit summarising the results of service is before the Court.

[11] Fairview has received only one response to its correspondence, which was an email from Raymond Ulyate. Mr Ulyate is a director of a company that owns benefited land. He is also one of the original grantees of the covenant. Mr Ulyate's initial communication was to the effect that he would require further time to respond as he was overseas. On 17 September 2023, he sent a further email confirming that he had no objection to the application for the removal of the covenant from the Reserve Lots.⁶

[12] In a minute dated 29 September 2023, Tahana J granted leave for Fairview to commence its application by way of originating application under ss 316 and 317 of the Act. In noting Fairview's efforts to contact the owners of the benefited land, Tahana J also accepted that there was no obvious basis upon which those owners who did not respond could oppose. Tahana J accordingly directed that the Council was the only party that needed to be formally served.

⁶ My Ulyate also confirmed that Shelley Ulyate did not object. Ms Ulyate is also a director of a company that owns benefited land.

Relevant Law

[13] Fairview's application to extinguish the covenant is necessary because of the effect of s 239 of the Resource Management Act 1991, which relevantly provides:

239 Vesting of reserves or other land

- (1) When the Registrar-General of Land deposits a survey plan, or a Chief Surveyor approves a survey plan to which section 228 applies,—
 - (a) any land shown on the survey plan as reserve to be vested in the territorial authority or the Crown, vests in the territorial authority or the Crown, as the case may be, free from all interests in land, including any encumbrances (without the necessity of any instrument of release or discharge or otherwise) for the purposes shown on the survey plan, and subject to the Reserves Act 1977;

...

[14] Fairview's filing for new titles was rejected by LINZ because the requisite consent was not acquired pursuant to s 224(b)(i):

224 Restrictions upon deposit of survey plan

No survey plan shall be deposited for the purposes of section 11(1)(a)(i) or (iii) unless—

- (a) *[Repealed]*
- (b) where land shown on the survey plan will vest in the Crown or a territorial authority, there is endorsed on the survey plan or deposited with the Registrar-General of Land, written consent to the subdivision given by—
 - (i) in the case of land subject to the Land Transfer Act 2017, every registered owner of an interest, including any encumbrance, in the land; or

...

[15] An order under s 317 of the Act extinguishing the covenant from the two Reserve Lots would remove the need for consent. Section 317 relevantly provides:

317 Court may modify or extinguish easement or covenant

- (1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement

or covenant to which the application relates (the easement or covenant) if satisfied that—

- (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
 - (i) the nature or extent of the use being made of the benefited land, the burdened land, or both;
 - (ii) the character of the neighbourhood;
 - (iii) any other circumstance the court considers relevant; or
 - (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
 - (c) every person entitled who is of full age and capacity—
 - (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or
 - (ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or
 - (d) the proposed modification or extinguishment will not substantially injure any person entitled; or
 - (e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or
 - (f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.
- (2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[16] In determining applications under s 317, the Court applies a two-stage test.⁷ First, the Court will consider whether one or more of the grounds in s 317(1) is made out. Second, the Court will determine whether to exercise its discretion to extinguish or modify the covenant. The onus of proof rests with the owner of the burdened land to show that there are reasons for the orders sought.⁸ Fairview's application relies on the grounds set out in s 317(1)(a) and s 317(1)(d).

[17] Under s 317(1)(a), Fairview must establish that the covenant ought to be extinguished because of a change since its creation in the nature or extent of the use of the benefited and/or burdened land. Here the focus is not on the fact of the change, but on the impact that change has on the benefit or burden arising out of the covenant.⁹ The change must have occurred since the creation of the covenant and before the application was made.¹⁰ Finally, the change must also have been lawful, for example it cannot have breached zoning or planning rules, or the terms of the covenant.¹¹

[18] Pursuant to s 317(d), Fairview must establish that the extinguishment would not substantially injure the benefited owners. Injury can include economic, physical, or intangible consequences.¹² The applicant must establish that any injury suffered will not be substantial.¹³ In instances where the benefited owners have been served, an absence of objection to the application will be strongly persuasive in showing that the extinguishment will not substantially injure a benefited owner.¹⁴

[19] If the Court considers that one of the grounds in s 317(1) is made out, then the Court has jurisdiction to make the order sought. In deciding whether to exercise that discretion, the expropriation of private property rights and the sanctity of contract are

⁷ *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657.

⁸ *Manuka Enterprises Ltd v Eden Studios Ltd* [1995] 3 NZLR 230 (HC); *Waikauri Bay Reserve Ltd v Jamieson* HC Auckland CP1981/87, 12 February 1990; *Rental Space Ltd v March* (1999) 4 NZ ConvC 192,873 (HC) at 192,887; and *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd* [2019] NZCA 147 at [72].

⁹ *Synlait*, above n 7, at [138]; citing *Okey v Kingsbeer* [2017] NZCA 625, (2017) 19 NZCPR 25 at [53].

¹⁰ *Reynolds v Parklands Properties Ltd* [2021] NZCA 394, (2012) 22 NZCPR 516, at [46]–[48].

¹¹ *Synlait*, above n 7, at [141].

¹² *Synlait*, above n 7, at [105].

¹³ *Chand v Auckland Council* [2021] NZCA 282, [2022] NZRMA 34.

¹⁴ *Cookeson Properties Ltd v Gray* [2016] NZHC 2112.

relevant factors to consider.¹⁵ However, these factors “must be considered in the factual context before the court, rather than as generic fetters on the court’s discretion.”¹⁶

[20] In *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, the Supreme Court noted that there has been a relaxation in the approach the courts have adopted to the exercise of their discretion under s 317. The Court went on to clarify that recent amendments to this provision have demonstrated a “parliamentary intention that the section should be applied less restrictively than it was in the past.”¹⁷

Applicant’s submissions

[21] Ms Wroe, counsel for the applicant, submits that the covenant ought to be extinguished because in the circumstances, the test under s 317 is met and there is no reason why the covenant should not be extinguished from the two local purpose reserves.

Application of s 317(1)(a)

[22] Ms Wroe says that there has been a change in the nature and/or extent of the use being made of the benefited and/or burdened land. At the time of the covenant’s creation, the benefited land was a single title, and the purpose of the covenant was primarily to prevent objections being raised to the subdivision and development of that title into 28 smaller parcels.

Application of s 317(1)(d)

[23] Ms Wroe submits that none of the benefited owners will be substantially injured by the change because the covenant no longer serves a useful purpose, and if it does, that benefit is retained by the new 16 residential lots still being bound the covenant.

¹⁵ *C Hunton Ltd v Swire* [1969] NZLR 232 at 235; and *Harnden v Collins* [2010] 2 NZLR 273 (HC) at [25].

¹⁶ *Synlait*, above n 7, at [88].

¹⁷ At [79].

[24] After having reviewed the materials, I requested that the applicant file further submissions on whether the possibility of the Council objecting to any further development of the benefited land would give rise to prejudice the owners of that land.

[25] Ms Wroe has since confirmed that there are two properties within the benefited land that still have development potential. These properties are owned by companies that have Mr Ulyate and/or Ms Ulyate as directors. As noted earlier, Mr Ulyate has confirmed that neither he nor Ms Ulyate object to this application.

[26] As Ms Wroe highlighted there may be circumstances where other benefited owners may wish to redevelop their land—in these circumstances the covenant would continue to apply. In theory, the removal of the covenant from the two Reserve Lots would mean that the Auckland Council could object to that development. But in practice, Ms Wroe submits that the Council would not object to the development as a landowner, but rather it would fulfil its role and function under the Resource Management Act as a neutral territorial authority. Ms Wroe submits that if the Council were to object for reasons that were not available to it as a territorial authority, that decision is likely to be reviewable.

Discussion

[27] Tahana J earlier made directions that the owners of the benefited land did not need to be formally served with these proceedings. I have reviewed and seen the affidavit of service, from which I am satisfied that a process server took steps to deliver correspondence and associated documents from the applicant's solicitors explaining the proposed extinguishment of the covenant from the Reserve Lots. I am accordingly satisfied that the owners of the benefited land have had an opportunity to consider the proposal and to respond to it if they wished to do so. As noted, only one has chosen to do so and has no objection to the proposed extinguishment of the covenant from the Reserve Lots.

[28] I would not have been prepared to extinguish the covenant in relation to the two Reserve Lots on the basis of s 137(1)(a). Rather than the purpose of the covenant being limited to the particular subdivision of the benefited land when it was a single title into 28 smaller parcels of land, the covenant is in more broad terms, by which the

owners of the burdened land covenant, among other matters, that they will not lodge any objection or object to the subdivision and development of the dominant land. While its immediate purpose may have been the then proposed subdivision into the 28 lots, the covenant is not framed in that way. And as Ms Wroe notes, there are two properties within the benefited land that still have development potential, though those properties are owned by companies associated with Mr Ulyate who has consented to the covenant being removed from the two Reserve Lots.

[29] I am satisfied, however, that it is appropriate to extinguish the covenant from the Reserve Lots pursuant to s 317(d) of the Act. Importantly, the application relates to removing the covenant from those two Reserve Lots only, and the benefit of the covenant will remain on all of the residential lots that will be created as a result of the subdivision of 6 McMenamin Place. Accordingly, each of the owners from time to time of the new residential lots will be bound by the terms of the covenant, unless and until it were to be modified or extinguished either by agreement or by order of the Court.

[30] In theory at least, there remains the prospect of the Council being relieved of the burden of the covenant in relation to the two Reserve Lots. However, I am satisfied that as a matter of practice, this does not give rise to any prejudice to the owners of the burdened land. The Council obviously has no interest in the Reserve Lots, or the development of any of the benefited land, other than in its role as local authority council. The Court accordingly proceeds on what I consider to be a reasonable assumption that the Council would approach any proposed further development or subdivision of the benefited land wearing its “local authority hat”, and thus exercising the controls and discretions in relation to any such subdivision that it already has, irrespective of being relieved of the burden of the covenant. For these reasons, I am satisfied that the extinguishment of the covenant on the Reserve Lots only “will not substantially injure any person” that would have otherwise benefited from the covenant remaining on those lots.

Result

[31] The applicant's originating application dated 18 September 2023 is accordingly granted. I make an order in terms of paragraph 1(a) of the application.

[32] I make no order as to costs.

Fitzgerald J