IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-2931
[2014] NZHC 442

IN THE MATTER OF	a decision made by the Auckland District Court on 20 October 2011
BETWEEN	BODY CORPORATE 341188 First Applicant
AND	GEORGE VICTOR WILKINSON AND JEREMY K COLLINGE AND OTHERS Second - Eleventh Applicants
AND	DISTRICT COURT AT AUCKLAND First Respondent
AND	ESCROW HOLDINGS FORTY-ONE LIMITED Second Respondent
AND	KALLINA LIMITED Third Respondent
AND	AUCKLAND COUNCIL Fourth Respondent
AND	CHANG TJUN CHONG & ORS Fifth - Thirteith Respondents

Hearing: 24 and 25 September 2013

Appearances: G J Kohler QC and Ms Wray for Applicants
T J Herbert for Second and Third Respondents
P H Mulligan and M McCullough for Fourth Respondent

Judgment: 12 March 2014

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 12 March 2014 at 3.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

[1] This proceeding concerns the construction of a Memorandum of Encumbrance[1] and a Memorandum of Land Covenants,[2] each dated 14 August 1989 ("Encumbrance", "Land Covenant", and together "Instruments").

[2] The issue to be decided is whether the Applicants ("body corporate" and "licensees" respectively) have a right to use "Area A" in a carparking building ("Carpark") situated on Lot 4 DP 126975 ("Lot 4"), as well as a right to travel over Lot 4 so as to have access to and from Area A. Area A is an area marked on a plan attached to the Land Covenant.

Introduction

[3] The body corporate is the body corporate of a residential unit title development ("development") in Auckland situated on Lot 2 DP 121257 ("Lot 2"). The present secretary of the body corporate is Body Corporate Specialists Limited ("BCSL"). BCSL was appointed as secretary in July 2010.

[4] The licensees are registered proprietors of units in the development, each asserting an entitlement to occupy a particular carpark or carparks situated in Area A. The Applicants' case is that the provisions of the Instruments are such that the licensees may use, and have access to and from, Area A.

[5] The Second and Third Respondents ("Escrow" and "Kallina" respectively) dispute the rights claimed by the Applicants. Each is wholly owned and/or controlled by Mr Humphrey O'Leary.

[6] The Instruments concern Lots 2 and 3 DP 121257 ("Lot 3") and Lot 4.

[7] The parties to the Instruments were City Realties (No 6) Limited ("City Realties"), Lakeland Properties Limited and Upland Holdings Limited ("Lakeland and Upland"). The Applicants, Escrow and Kallina are the successors in title to those parties.

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[1] Memorandum of Encumbrance CO79599.15 dated 14 August 1989.
[2] Memorandum of Land Covenants CO79599.12 dated 14 August 1989.

[8] The Instruments were executed in the course of a subdivision of land in 1989. In the course of the subdivision the title to each of Lots 2 and 3 was amalgamated with an undivided one half share in Lot 4.

[9] City Realties was the registered proprietor of Lot 2 and an undivided one half share in Lot 4 and Lakeland and Upland were the registered proprietors of Lot 3 and the other one half share in Lot 4.

[10] Escrow has owned the title to Lot 3 and an undivided one half share in Lot 4 since October 1990.[3]

[11] However, the title to Lot 2 and the other half share in Lot 4 was "de-amalgamated" in 2006. The title was cancelled and separate titles issued for Lot 2 and the half share in Lot 4. The Applicants are the owners of Lot 2. Kallina has owned the other half share in Lot 4 since July 2009.[4]

[12] The further issue as to access arises because the Applicants do not have a right of way over part of Lot 4 that they must use if they are to use Area A. There is a formed driveway(s) in place over this part of Lot 4. A right of way over this part of Lot 4 is not, however, appurtenant to Lot 2.

[13] The circumstances leading to the involvement of the District Court and Auckland Council ("Council"), being the First and Fourth Respondents, are referred to below. Both abide the decision of the Court. At my request the Council filed two affidavits providing some relevant background material.

[14] The Fifth to Thirtieth Respondents are also owners of units in the development. References below to unit owners are references to the Second Applicants and the Fifth to Thirtieth Respondents, or any successor in title. None wished to be heard in the proceedings and they too abide the decision of the Court.

[15] The Applicants commenced this proceeding in May 2012 and it came on for trial on 3 September 2012. I adjourned it on 5 September 2012 after hearing

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[3] Brief of Evidence of H J O'Leary dated 24 September 2013, at [4].
[4] At [49].

evidence for the Applicants, so that they could attend to service on the Fifth to Thirtieth Respondents. I heard evidence from Mr O'Leary when the hearing resumed. Much of Mr O'Leary's evidence in chief was in the nature of submission and so of no assistance. Affidavits that he had sworn in the proceedings at an earlier time were similarly submission.

Relief sought

[16] The Applicants have already been granted judicial review of an order made by the District Court on 19 October 2011. I say more below about the District Court's order and the relief granted.

[17] The Applicants seek various forms of relief which, if granted, would have the effect of confirming or recognising the required right of way over part of Lot 4 and a right to use Area A.

[18] First, the Applicants seek declaratory relief as to their rights and obligations and those of Escrow, Kallina and the Fifth to Thirtieth Respondents pursuant to the Instruments.

[19] Secondly and alternatively, if I find (as I do) that the Instruments do not confer an express right to use Area A and the required right of way over part of Lot 4, the Applicants seek a declaration to the effect that the Instruments contain an implied term to the same effect.

[20] Thirdly, the Applicants seek relief solely directed to the need for a right of way over part of Lot 4. They seek a declaration that Escrow and Kallina are estopped from denying the Applicants the use of the formed driveway(s) on Lot 4, that estoppel being said to give rise to an equitable easement. The claim of estoppel was advanced initially in respect of both a right to use Area A and of access over Lot 4. In closing submissions, however, counsel for the Applicants rested their case as to use on the causes of action referred to in [18] and [19] above.

[21] Alternative causes of action, again directed to the issue of access, were not argued as they were added to the pleading after setting down. These were claims for a declaration to the effect that the Applicants are entitled to modify a wall between

Lots 2 and 4 to provide vehicular access to and from Area A, alternatively for relief under the "landlocked land" provisions in ss 326 to 331 Property Law Act 2007 ("PLA").

Conclusion

[22] For the reasons set out below, I accept the submission for Escrow and Kallina that the Instruments do not expressly or by implication confer on the unit owners a right to use Area A or to the required right of way. To the extent owners of Lot 2 have previously enjoyed those rights, they have done so as a result of their ownership of an undivided one half share in Lot 4.

[23] The Instruments do, however, remain binding on the parties as successors in title. An important aspect of this conclusion is that the successor in title to Lot 2 has a right to restrain any use of Lot 4, or parts thereof, that is other than in accordance with the Instruments.

Background

[24] Lots 2, 3 and 4 were formerly comprised in Lot 1 DP 113758. This land is near College Hill, Auckland.

[25] In 1989, Lot 1 DP113758 was subdivided into three Lots – 1, 2 and 3 DP 121527.

[26] This subdivision was followed by a subdivision of Lot 1 DP 121527 into two Lots, being Lots 4 and 5 DP 126975 ("Lot 5").

[27] Lot 2 comprises 1637 m^2. It can loosely be described as "the middle Lot". Lot 2's northern boundary adjoins the southern boundary of Lot 3 and its southern boundary adjoins the northern boundaries of Lots 4 and 5. The basement of the building on Lot 2 comprises carparks and is adjacent to the Carpark on Lot 4. There is pedestrian access from the basement of Lot 2 to Area A in the Carpark.

[28] Lot 3 comprises 2779 m^2. An office building is situated at the northern end of Lot 3.

[29] Lots 4 and 5 are at the southern end of the site. Lot 4 comprises 685 m^2. The Carpark comprises a basement and ground floor.

[30] The subdivision of Lot 1 DP113758 occurred in connection with an application by Lakeland in 1988 for consent to construct three office buildings, being Buildings A, B and C, on Lots 1, 2 and 3 respectively.

[31] The subdivision of Lot 1 DP 121527 arose from a proposal by Lakeland in about May 1988 to locate some of the car parking required for Buildings B and C on an adjacent site. This proposal led not only to the subdivision of Lot 1 DP 121257 into Lots 4 and 5 (DP 126975), but also to the amalgamation of the titles to each of Lots 2 and 3 with an undivided one half share in Lot 4 and to the execution and registration of the Instruments.

[32] In May 1988 the Council's Planning Department agreed to Lakeland's proposal on the following condition:[5]

> This consent is subject to the following condition:
>
> That proposed Lot 4, D.P.121257 have registered on its title a restriction that is to the satisfaction of the City Solicitor to prevent:
>
> (a) it being used for other than car parking and accessways for [Lots 2 and 3] (as per submitted plans) without prior consent of Council,
>
> (b) Lot 4 being owned by other than the owners of Lots 2 and 3.

[33] On or about 9 June 1988, the Council approved the plan of subdivision of Lot 1 DP 121257. The report of the Council's Department of Planning and Community Development states:[6]

> The applicants have now submitted Plan C128/22 which is a further subdivision of Lot 1 on the previous plan. The plan is necessary to satisfy the parking requirements for the buildings on Lot 1 and 2 by creating a separate parking lot in preference to creating innumerous rights of way.
>
> Plan C128/22 … results in the following lots:-
>
> (a) Lot 4 of 683 m2 which will contain a low level parking building and carparking spaces for Lots 2 and 3 DP121257 the owners of which it is proposed will jointly own Lot 4. The District Land Registrar has

[5] Affidavit of Q E Budd sworn 23 September 2013, Exhibit "D".
[6] Report to the Planning Applications Sub-Committee, dated 9 June 1988.

> agreed to the amalgamation clause in her letter dated 1 June 1988. Planning approval dated 23 May 1988 requires that an encumbrance be registered against the title for Lot 4 restricting its use to carparking and accessways. Lot 4 has no road frontage but will not need an exemption pursuant to Section 321(3)(c) as it will amalgamate with Lot 2 and 3 DP 121257 which have road frontage.
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> ...

[34] The Department recommended that the proposed subdivision of Lot 1 DP 121257 be approved on condition:[7]

> 2:5 That a certificate of compliance ... shall not be signed until condition 2:5:1 hereunder [has] been met to the satisfaction of the Director of Planning and at the expense of the subdivider:
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> 2:5:1 A covenant of encumbrance is to be drawing *(sic)* to the satisfaction of the City Solicitor and registered against certificate of title to issue for Lot 4 restricting the use of that site to that of parking for Lots 2 and 3 DP121257 together with access to Lot 5 Plan C128/22 and Lot 44, DP 110.

[35] The Encumbrance (not the Land Covenant as the Applicants' pleading suggests) was registered to comply with that condition.

[36] The Instruments were executed on or about 14 August 1989.

[37] The subdivisions were completed, title was issued for each of Lots 2 and 3 with an accompanying undivided one half share in Lot 4 and the Instruments were registered on 11 December 1989.

[38] Building B on Lot 2 was constructed in or about 1989. It was altered for residential accommodation in 2005/2006 and subdivided into unit titles. At present the development comprises 34 units but there has always been the prospect of additional units and in January 2013 the Council granted resource consent for the construction of eight such units.

[39] By late 2004, Central Strata Management Limited ("CSM"), a company wholly owned and/or controlled by Mr Steven Kelly, was the registered proprietor of Lot 2 and the (amalgamated) one half share in Lot 4.

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[7] Ibid.

[40] In 2005 CSM sought resource consent for the development comprising 42 residential units with some of them, as I have said, to be built at a later time.

[41] In so far as concerns parking, the Council planning report on CSM's application was to the effect that such parking as the District Plan required for the development could be provided on Lot 2 itself. The Council granted consent to CSM's application on this basis.

[42] The evidence before me includes matters pertaining to whether or not sufficient parking for the development was in fact provided on Lot 2 and whether there was a continued need for occupiers of Lot 2 to use Area A. In my view, that evidence is irrelevant to the construction of the Instruments executed some 17 years earlier.

[43] At the same time as it obtained consent for the development, CSM obtained resource consent to the de-amalgamation of the title to Lot 2 and the one half share in Lot 4. Separate titles issued on 26 May 2005.

[44] On 14 September 2006 CSM transferred its interest in Lot 4 to Hump O'Kelly Limited. This transfer was immediately followed by three further transfers, the last of which was to a company called Stretchland Limited ("Stretchland").

[45] CSM or some related party began to sell the units on Lot 2 in 2006.

[46] Kallina acquired Stretchland's one half share in Lot 4 in or about July 2009. Since then it or Escrow has let carparks to third parties.

Licensees

[47] The licensees are 10 unit owners. Some purchased units prior to July 2009 and some thereafter. I accept the evidence for each that they believed they were acquiring a right to occupy a carpark or carparks in Area A on the purchase of their unit, and that they would not have purchased (or not at the price they did) but for that belief. Some hold what purports to be a licence to occupy a particular carpark. The Applicants do not, however, contend that these licences are binding on Escrow and Kallina, and nor could they in my view.

Expenses

[48] The cost of such electricity as has been supplied to Area A has always been paid by Lot 2. The power supply to Area A is linked to the supply to Lot 2.

[49] From at least May 2010 Escrow and/or Kallina (Mr O'Leary said there was no particular reason why one rather than the other has issued invoices) have made various demands of the body corporate for payment of a 24/39th share of operating expenses for the Carpark. The demand for a 24/39th share results from clause 1.1 of the Land Covenant to which I refer below. All bar one of these demands, some of which have been in the nature of substantial capital expenditure, have been met.

[50] Escrow's invoice to the body corporate dated 18 May 2010 was for $55,517.72 (all sums exclude GST)[8], principally for costs of waterproofing.

[51] Kallina's invoice dated 17 December 2010 was for $5,476.74.[9] This was in respect of operating expenses for the year ended 30 June 2010 and invoiced charges in respect of rates, cleaning, security, insurance and "valuation".

[52] Escrow rendered an invoice in May 2011 for $13,331.91.[10] The vast majority of this was charged in respect of waterproofing costs said to be payable by "Lot 1" but expressed to be payable by Lots 2 and 3 "in the first instance". It is not clear to me that the registered proprietor of Lot 2 has paid this invoice or at least those costs said to be due from Lot 1.[11] Nor was there any satisfactory explanation as to how these expenses came to be due from Lot 1, as aside from anything else there is no Lot 1. Regardless, nothing turns on that point for the moment.

[53] Kallina's invoice of 23 August 2011 was for $5,507.64 and was in respect of operating expenses for the year ended 30 June 2011.[12] Again, this invoice was in respect of rates, cleaning, security, insurance and valuation.

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[8] Tax Invoice Escrow Holdings (41) Ltd to Body Corporate and Building Managers Ltd dated 18 May 2010, at CB 532.
[9] Tax Invoice 17120 Kallina Ltd to Body Corporate and Building Managers Ltd dated 13 December 2010, at CB 609.
[10] Tax Invoice 26511 Escrow Holdings (41) Ltd to Body Corporate Specialists dated 26 May 2011, at CB 630.
[11] Notes of Evidence dated 3 September 2013, at 4 and 5.
[12] Tax Invoice 23811 Kallina Ltd to Body Corporate Specialists Ltd dated 23 August 2011, at CB 633.

Judicial review

[54] The application for and the grant of judicial review to which I referred above arose from the following series of events.

[55] From October 2009 there was an exchange of correspondence between the Applicants, Escrow, Kallina and others concerning the extent of the Applicants' access over Lot 4 and the use of Area A. This correspondence did not lead to an agreement.

[56] In September 2011, Escrow and Kallina made an originating application to the District Court for an order extinguishing all the covenants contained in the Land Covenant. This order was sought pursuant to s 316 Property Law Act 2007 ("PLA").

[57] Section 316(3) PLA requires an applicant to serve such an application on the territorial authority, being the Council in the present case, and on any other persons that the Court directs "on an application for the purpose". Escrow and Kallina served the Council. They did not, however, inform the Court of the Applicants' interest in the matter, did not make an application for directions as to service and they did not serve the application on the Applicants. In fact, in the application (signed by counsel for Escrow and Kallina) the Court was advised:[13]

> The proposed extinguishment will not substantially injure any person entitled.

[58] Mr O'Leary swore an affidavit in support of the application to the District Court but made no reference to the interest claimed by the Applicants or, for that matter, to the sums the body corporate had paid on the invoices to which I have referred.

[59] Subsequently a consent memorandum executed by the Applicants and the Council was filed, the District Court made the order sought on 19 October 2011 and the Land Covenant was extinguished.

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[13] Originating Application for Extinguishment of Covenant dated 19 September 2011, at CB 686.

[60] The Applicants learnt of the order in or about February 2012. Their request to counsel for Escrow and Kallina for a copy of the documents lodged with the Court was declined.[14]

[61] By letter dated 14 February 2012, Kallina advised that it would not provide carparking in the absence of payment and rendered an invoice for March 2012 of $3,510 (excluding GST).[15]

[62] The Applicants then sought Escrow and Kallina's agreement to set aside the order of the District Court. Escrow and Kallina declined.

[63] In so far as concerns the Applicants' complaints that it should have been served, counsel for Escrow and Kallina essentially took the position that the Court was aware of the Applicants' interest "on the face of the [Land] Covenant" and from the certificates of title exhibited to the affidavit filed in support. Counsel also stated that the "presence of [the Applicants] could only serve to waste time and costs", and suggested that the Applicants' best option was to "put up and shut up" (presumably "or shut up").[16]

[64] This proceeding followed, and in June 2012 the Court made interim orders enabling the licensees to continue to park in the Carpark pending further order.[17]

[65] As a result of the circumstances in which the order was made, the Applicants sought judicial review when they commenced this proceeding. Escrow and Kallina consented to the application for review during the hearing in September 2012. I then quashed the District Court's order of 19 October 2011.[18]

[66] Kallina, Escrow and their counsel had a duty to advise the Court of the Applicants' interest in the originating application. The Court was misled as a result of their failure to do so. The fact that Escrow and Kallina "have put their hand up", as their counsel put it, acknowledges but does not rectify the omission.

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[14] Emails between Legal Vision and T Herbert dated 13 February 2012, at CB 693.
[15] Letter Kallina Ltd to Body Corporate Specialists Ltd dated 14 February 2012, at CB 694.
[16] Letter T Herbert to Legal Vision dated 28 February 2012, at CB 698.
[17] *Body Corporate 341188 v District Court at Auckland* [2012] NZHC 1339.
[18] *Body Corporate 341188 v District Court at Auckland* [2012] NZHC 2301.

[67] The Applicants seek indemnity costs in respect of the application for review. I refer to the matter of costs at the conclusion of this judgment. At present, it is enough to say that the application for indemnity costs has merit.

Discussion

[68] I turn now to consider the relevant terms of the Instruments and to set out the reasons for the conclusion that I have expressed above.[19]

Encumbrance

[69] The parties to the Encumbrance were City Realties, Upland and Lakeland. Escrow and Kallina do not take any issue as to privity, and acknowledge that the Applicants may seek to enforce the provisions of the Encumbrance.

[70] The recitals record that these parties were the registered proprietors of Lots 1 and 2 DP 121257 and that the Council had agreed to a subdivision of that land on condition that the parties execute the Encumbrance.

[71] Clauses 1 and 2 of the Encumbrance provide:[20]

> 1. THE Encumbrancers hereby encumber [Lot 4] for the benefit of the Council for a term of 999 years with an annual rent charge of 5 cents to be paid on the 1st day of June each year if demanded by that date.
>
> 2. THE Encumbrancers covenant with the Council as follows:-
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> That except with the prior consent of the Council the Encumbrancers shall not permit or cause [Lot 4] hereto to be used for any purpose other than carparking or access for the benefit of Lots 2 and 3 Deposited Plan.[21]

[72] The Encumbrance does not confer on Lots 2 or 3 a positive right of access to, or to park on, Lot 4. It is clear, however, that in the absence of the prior consent of the Council, the registered proprietors of Lot 4 may not use Lot 4 other than for the purposes stated in clause 2.

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[19] At [22]-[23].
[20] Memorandum of Encumbrance C079599.15 dated 14 August 1989, at [1] and [2].
[21] No Deposited Plan number was provided in clause 2. It is clear, however, that the Deposited Plan number was 121257.

[73] Accordingly, in the absence of the prior consent of the Council, it would be a breach of the encumbrance for Escrow and Kallina to permit Lot 4 to be used for carparking or access by a third party. As I understand it, this has occurred.

[74] Moreover, although not raised before me, the words "for the benefit of Lots 2 and 3" may restrain the registered proprietors of Lot 4 from allowing the use of Lot 4 for carparking and access by the registered proprietor of Lot 3 alone. This is important because Escrow and Kallina permit the use of Lot 4 for such purposes by the occupiers of Lot 3 but contend they may refuse the same to the occupiers of Lot 2.

[75] I am not satisfied that it is open to Kallina and Escrow to do so. If one Lot is to be allowed the use of Lot 4 for the specified purposes, then in the absence of the prior consent of the Council, so must the other. The position might be different if the closing words of clause 2 were "[Lots 2 or 3] or either of them".

Land covenant

[76] The recitals to the Land Covenant record that City Realties as covenantor is the registered proprietor of Lot 2 and an undivided one half share in Lot 4; that Lakeland and Upland as covenantee are the registered proprietors of Lot 3 and an undivided one half share in Lot 4; and that covenantor and covenantee wished to register land covenants "for the good management of the whole of" Lot 4 and all improvements from time to time erected thereon, defined as "the Carpark". The terms "covenantor" and "covenantee" are defined to include the parties and their successors in title.[22]

[77] Clauses 1 and 2 impose an obligation on the registered proprietors of Lots 2 and 3 respectively to pay a share of the operating expenses of the Carpark. Clauses 3 to 10 inclusive impose obligations on the registered proprietor of Lot 4 as to the use and occupation of the Carpark and matters such as keeping the Carpark insured, in good repair, paying rates and so on. Clause 11 is an arbitration provision. A plan attached to the Land Covenant identifies Area A as "Carparks for Lot 2" (not "of

[22] Memorandum of Land Covenants C079599.12 dated 14 August 1989, at [12.1](a) and (b).

Lot 2" as clause 3 states), the Areas set aside for Lot 3 and access over part Lot 4 and through the Carpark.

[78] The Applicants rely particularly on clauses 1 and 2 which are perpetual reciprocal covenants on the part of the registered proprietors of Lots 2 and 3, and on clauses 3 and 8.

[79] Clause 1.1 provides:[23]

> THE COVENANTOR BEING THE REGISTERED PROPRIETOR OF LOT 2 AND THE COVENANTORS SHARE OF LOT 4 HEREBY COVENANTS TO THE INTENT THAT LOT 2 SHALL BE FOREVER SUBJECT TO THESE COVENANTS AND THESE COVENANTS SHALL BE FOREVER APPURTENANT TO LOT 3 AND THE COVENANTEE'S SHARE OF LOT 4 AS FOLLOWS:
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> 1. Operating Expenses and Outgoings
>
> 1.1 The registered proprietor from time to time of Lot 2 shall pay a 24/39 share of the operating expenses of the Carpark comprising the total sum of all rates, taxes (except as excluded in subparagraph (a)), costs and expenses properly or reasonably assessed or assessable, paid or payable or otherwise incurred including goods and services tax assessed thereon in respect of the Carpark and in respect of the control, management and maintenance of the Carpark or in the use or occupation of the same and without limiting the generality of the foregoing shall include:
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> ...

[80] Clause 1.1 goes on to provide that the operating expenses so payable shall include rates, insurance premia, and the cost of utilities, services, cleaning, security services, repair and maintenance and so on.

[81] As I have said, clause 2 is a reciprocal covenant by the registered proprietor of Lot 3, and in identical terms, save that the registered proprietor of Lot 3 is to pay a 15/39th share of the expenses.

[82] Clauses 3 and 8 impose perpetual obligations on the registered proprietor of Lot 4. Clause 3 provides:[24]

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[23] At [1.1].
[24] At [3].

THE COVENANTOR AND THE COVENANTEE BEING THE REGISTERED PROPRIETOR OF LOT 4 AS TENANTS IN COMMON AS TO AN UNDIVIDED ONE HALF SHARE EACH DO HEREBY COVENANT TO THE INTENT THAT LOT 4 SHALL BE FOREVER SUBJECT TO THESE COVENANTS AND COVENANTS SHALL BE FOREVER APPURTENANT TO LOT 2 AND LOT 3 AS FOLLOWS:

3. Use

3.1 The registered proprietor(s) from time to time of Lot 4 subject only as herein expressly mentioned shall not use or occupy nor shall they permit any person other than the registered proprietor from time to time of Lot 2 to use or occupy for any purposes whatsoever that part of the Carpark shown on the attached plan as "A" being "Carparks of Lot 2" AND FURTHER shall not use or occupy nor shall they permit any person other than the registered proprietor from time to time of Lot 3 to use or occupy for any purposes whatsoever that part of the Carpark shown on the attached plan "B" "C" "D" and "E" as being "Carparks for Lot 3" AND FURTHER shall not use or occupy nor shall they permit any person to use or occupy the part of the Carpark shown on the attached plan as "F" and "G" as "Carpark Access" except for the purposes of reasonable vehicular and pedestrian access and egress by any person having the lawful use thereof.

[83] Clause 8.1 provides:

8. Destruction of Carpark

8.1 In the event of any improvements erected on Lot 4 being destroyed or damaged by fire earthquake or from any cause whatsoever the registered proprietor(s) from time to time of Lot 4 shall with all reasonable despatch repair and make good such destruction or damage in a proper and workmanlike manner and the cost of doing so shall be borne by the registered proprietor(s) from time to time of Lot 4.

[84] It is common ground that the Land Covenant does not confer an express right of parking or access on either of Lots 2 or 3. The issue is whether that omission should be cured by implication or otherwise.

[85] Counsel for the Applicants submits that the failure to confer express rights of access and parking is explicable on the basis that until 1987 it was not possible to enforce a positive covenant, and that the omission can be cured by taking a purposive approach to construction and/or implying a term that will ensure these rights are enjoyed. I note that the Land Covenant was executed in 1989. The parties might have imposed a positive obligation if they wished.

[86] Counsel for the Applicants also submits that each of the particular provisions to which I have referred contemplates the use of the Carpark for carparking and that there would be no point to clause 8.1 if the Carpark were not to be used.

[87] I am not satisfied that the failure to confer an express right to use Area A and to have access across Lot 4 may be explained or cured in the manner counsel for the Applicants submits. I accept the submission in the previous paragraph but it does not affect the view I have reached.

[88] I accept the submission of counsel for Escrow and Kallina that it was never intended that the Land Covenant would confer a right to park on or provide access over Lot 4. That was unnecessary, given the amalgamation of the titles to each of Lots 2 and 3 with a half share in Lot 4.

[89] I accept the submission of counsel for Escrow and Kallina that the rights of a registered proprietor of a fee simple title, such as the fee simple of an undivided half share in Lot 4, would include a right to travel over the land and to park anywhere thereon.[25]

[90] The registered proprietors of Lot 2 enjoyed these rights as an incident of their fee simple title to a share in Lot 4 until 2006. The position changed as a result of the de-amalgamation initiated by CSM and CSM's subsequent transfer of its one half share in Lot 4. Thereafter successors in title in respect of Lot 2, including the licencees, could only use the Carpark by a lease or licence from the registered proprietor(s) of Lot 4.

Result

[91] I decline to make any declaration and/or to grant any other relief sought by the Applicants, save to the extent granted in my interim judgment of 7 September 2012.

[92] Lots 2, 3 and 4 remain subject to the Instruments. Amongst other things, the proprietors of Lots 2 and 3 must pay the shares of expenses due from them under the

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[25] *Fejo v Northern Territory of Australia* (1998) 195 CLR 96, at [43].

Land Covenant. The registered proprietors of Lot 4 must not permit the use of Lot 4 other than in accordance with the Instruments.

Costs

[93] I make no order as to costs for the moment.

[94] It may be that no costs are sought or, if sought, that they can be agreed. Failing that, any party seeking costs should file and serve their submission by 24 March 2014 and any in reply should be filed and served by 2 April 2014.

[95] I would expect the Council to bear its own costs. Its participation was limited and did not extend beyond making available documents relating to resource consent matters.

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M Peters J

Solicitors:	Legal Vision, Auckland Goodwin Legal, Auckland Buddle Findlay, Auckland Crown Law, Wellington
Counsel:	G J Kohler, Auckland T J Herbert, Auckland
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