IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2018-419-000166
[2018] NZHC 3436

IN THE MATTER	of ss 316 and 317 Property Law Act 2007
AND	
IN THE MATTER	of an application by STONEHILL TRUSTEE LIMITED for an Order Extinguishing or Modifying Land Covenants
BETWEEN	STONEHILL TRUSTEE LIMITED Applicant
AND	NEW ZEALAND INDUSTRIAL PARK LIMITED First Respondent
	YE QING Second Respondent

Hearing: On the papers

Counsel: S L Robertson QC for the Applicant
D T Broadmore and HCMS Snell for the Respondents

Judgment: 20 December 2018

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Thursday, 20 December 2018 at 2:00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Buddle Findlay, Auckland
Bay Law Office, Auckland

Counsel: S Robertson QC, Auckland

Background

[1] On 13 November 2018, I issued a judgment that two land covenants be modified so that they no longer apply to a 28 hectare block of industrial land in Pokeno.[1] I granted leave for counsel to file further submissions on the issue of reasonable compensation and on costs in the event that they could not be agreed between the parties. I have now received submissions from both parties.

Compensation

[2] The parties, at least *prima facie*, disagree on applicable principle.

[3] New Zealand Industrial Park Limited (NZIPL) argues for a willing buyer/willing seller test. It relies on *MacRae v Walshe*,[2] which supports that proposition. In fixing reasonable compensation, the Court must consider the prospective benefits and losses both to the grantor and grantee.[3] NZIPL focuses on the benefit to Stonehill Trustee Limited (Stonehill). It asks for compensation in the amount of the difference between the price paid by Stonehill for the land and the price paid by Synlait.

[4] Stonehill ultimately submits no compensation should be awarded because NZIPL will not suffer any loss. It points out there is little authority on the question of compensation in relation to covenants—other cases relate to easements. It says the correct approach is to first identify if there is any actual detriment to NZIPL as a result of extinguishment.[4] Next, the Court should consider whether or not there are other factors of benefit or detriment to either side that would affect what one or the other would have been willing to pay in hypothetical negotiations.[5]

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1 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 2938.
2 *MacRae v Walshe* [2013] NZCA 664, (2013) 15 NZCPR 254 at [52]–[60].
3 *MacRae v Walshe* [2013] NZCA 664, (2013) 15 NZCPR 254 at [94] and *Mikitasov v Little* [2013] NZCA 604 at [14].
4 *Cambray North Island Ltd v Minister of Land Information* (2011) 12 NZCPR 721 (HC) at [28]; and *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670 at [71].
5 *Cambray North Island Ltd v Minister of Land Information* (2011) 12 NZCPR 721 (HC) at [28]; and *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670 at [71].

[5] Stonehill relies on *North Holdings Development Ltd v WGB Investments Ltd*, where Katz J refused to award compensation:[6]

> [79] Finally, I concluded that the modification to the covenant will not cause loss to the respondent and that no award of compensation is therefore justified.

[6] I do not think much turns on which party's approach to principle is adopted. Whichever way you look at it, NZIPL will not suffer any loss because of the extinguishment of the covenants as they were of little practical value. The amount it could reasonably have expected in a hypothetical negotiation would have been minimal. NZIPL also has not produced any evidence to support its claim to compensation.

[7] The major factor for me is the decision of the original owner of the benefitted land, Winstone Aggregates Limited (Winstone), not to proceed with development of the quarry and instead be part of the process by which a substantial part of its land was rezoned Industrial 2, the burdened land was merged with part of the benefited land and then subdivided. Winstone obviously saw more value in selling all the land in parcels rather than as a whole with a view to development of a quarry for which resource consents were held. It is this factor that distinguishes this case from those cited by NZIPL.

[8] I therefore decline to award compensation, as Katz J did in *North Holdings Development Ltd v WGB Investments Ltd*.

Costs

[9] NZIPL seeks an order for indemnity costs. Alternatively, it seeks scale costs. In the further alternative, it says costs should lie where they fall.

[10] According to NZIPL, the usual principle that costs follow the event does not apply in the present case. As Katz J said in *North Holdings Development Ltd v WGB Investments Ltd*:[7]

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6 *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670 at [71].
7 *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 1175.

> [10] The reason for this reversal of the usual costs principles is simply that, in cases such as this, the applicant is seeking to remove or modify the respondent's existing contractual rights. The applicant is seeking an indulgence from the Court. If a respondent successfully opposes such an application they will, of course, be entitled to an award of costs. The converse, however, does not necessarily apply. A successful applicant will not be entitled, as of right, to their costs. Indeed in some cases, as I have noted above, an award of costs will be made against a successful applicant.
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> [11] The nature of the proceedings must be kept in mind when considering costs issues. Unlike in ordinary civil litigation, a party who opposes extinguishment or modification of a covenant starts from the position of being "in the right". In opposing the application they are seeking to protect their existing legal rights. For that reason the normal rule that costs follow the event does not apply. A respondent who unsuccessfully opposes an application to extinguish or modify a covenant should generally not have to pay the applicant's costs, unless he or she has acted unreasonably.

[11] NZIPL claims indemnity costs pursuant to r 14.6(4)(e) of the High Court Rules—that they are entitled to such under a contract or deed. This claim is based on cl 7 of sch 3 of each covenant, which provides:

> The Covenantor shall pay ... the Covenantee's and/or Quarry occupiers and operators' solicitors' legal costs and disbursements directly or indirectly attributable to the enforcement of this deed and its covenants.

[12] On the other hand, as the successful party, Stonehill claims costs—including increased costs. It says an award is appropriate because NZIPL unreasonably refused to surrender the covenants when invited to do so at the outset. And that NZIPL unnecessarily contributed to time and expense throughout the proceeding. Alternatively, Stonehill says costs should lie where they fall. Stonehill says cl 7 of sch 3 of the covenants does not apply because this proceeding did not concern "enforcement".

[13] In my view, however, cl 7 applies. The term "enforcement" in its ordinary meaning means to give force to. The Oxford English Dictionary defines it as "to put force or strength into". That is what NZIP tried to accomplish in defending this proceeding. The effect of Stonehill's application was to deprive the covenants of any force. As to the purpose of cl 7, I consider it was intended to cover legal costs necessary to receive the benefit of the covenants. It was also drafted broadly—"directly or indirectly". Again, this is consistent with NZIPL's opposition. It follows NZIPL is entitled to indemnity costs.

[14] I therefore order Stonehill to pay NZIPL's costs which are reasonably incurred and reasonable in amount. If quantum cannot be agreed, memoranda of no more than five pages are to be filed by Friday, 22 February 2019.

Woolford J