

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

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

**CIV-2021-404-2218
[2022] NZHC 20**

BETWEEN

JOHN DAVID LATTER
Applicant

AND

YOO CHONG BONG and HWA YOUNG
PYUN
First-Named First Respondents

JIANGBO JIN
Second-Named First Respondent

DOROMAY TRUSTEE LIMITED
Third-Named First Respondent

Continued ...

Hearing: 14 January 2022

Appearances: S A Keall and A Nicholls for the Applicant
R O Parmenter for the Third-Named First Respondent
No appearance for remaining Respondents

Judgment: 14 January 2022

**JUDGMENT OF LANG J
[on application for orders under ss 316 and 317 of the Property Law Act 2007]**

*This judgment was delivered by me on 14 January 2022 at 3.30 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

TREVOR GRAHAM WILLIAMS and
JANICE MARGARET WILLIAMS
Fourth-Named First Respondents

YINGYI XU
Fifth-Named First Respondent

NISHA MARIAN NATI and DAVID IAN
CLARK
Sixth-Named First Respondent

PETER GEORGE KOVACEVICH
Seventh-Named First Respondent

ZIQIANG LI
Eighth-Named First Respondent

[1] Mr Latter is the owner of a residential property situated in Constable Lane, West Harbour. His property is subject to three land covenants created by a Memorandum of Transfer registered against the title to the property in 1985. The covenants are for the benefit of nine neighbouring properties.

[2] Mr Latter has entered into an agreement to sell his property and the purchaser requires the covenants to be removed as a condition of settlement. Mr Latter has therefore applied for orders under ss 316 and 317 of the Property Law Act 2007 (the Act) extinguishing the covenants.

[3] Copies of the present proceeding, together with a Minute issued by Van Bohemen J on 17 December 2021, have been served on the registered proprietors of each of the nine properties affected by the application. The third respondent, Doromay Ltd (Doromay), initially took steps to oppose the application but subsequently consented to it on 16 December 2021. I now make orders by consent between the applicant and Doromay as sought in the joint memorandum of counsel dated 16 December 2021. The owners of the remaining properties have taken no steps to oppose Mr Latter's application.

[4] The Auckland Council, the territorial authority responsible for the area, has also been served with the application and abides the decision of the Court.

[5] I record that I have been assisted by the fact that I conducted a site visit prior to the commencement of the hearing in the company of Mr Latter's counsel. This gave me an appreciation of the extent to which the extinguishment of the covenants is likely to affect the properties owned by those parties who have not taken steps to oppose the application.

Background

[6] For ease of reference I attach a plan showing the properties affected by the application. Mr Latter's property is Lot 99 on the plan. The properties that enjoy the benefit of the covenants registered against the title to his property are Lots 96, 97, 98, 101, 102, 103 104 and 105. The owners of Lots 98, 101 (which is subject to two cross-

lease titles owned by the same persons) and 105 have consented to the application. The remaining owners have taken no steps to oppose it.

[7] The covenants were registered at a time when a company called Land Projects Limited was undertaking a subdivision of the land now comprising all ten properties affected by the present application. That company transferred the land to a third party in 1984. The Memorandum of Transfer, which was registered on 16 October 1985, contained the following restrictive covenants:

AND WHEREAS by the said Agreement for Sale and Purchase it was provided that the Purchaser of the said land should enter into certain covenants in the form hereinafter appearing restricting the user of the said land for the benefit of the lots comprised in the Dominant Tenement **NOW THEREFORE** pursuant to and in consideration of those premises and in consideration of the sum of **FORTY FIVE THOUSAND DOLLARS** (\$45,000.00) paid to the Transferor by the Transferees (the receipt of which sum is hereby acknowledged) and of the Transferees entering into the said covenants the Transferor **HEREBY TRANSFERS** to the Transferees all its estate and interest in the said land and in further pursuance of these premises the Transferees for themselves and their successors in title to the said land as servient tenement **HEREBY COVENANT AND AGREE** with the Transferor for the benefit of the land called “the Dominant Tenement” not heretofore transferred by the Transferor **AND** also separately with each and every one of the registered proprietors of and for the benefit of the land called the Dominant Tenement and heretofore and hereinafter transferred to such proprietors by the Transferor that the Transferees will not at any time:

- (i) That he will not erect or permit to be erected on the said land any dwellinghouse or residential unit without first obtaining the approval of the Vendor to the plans thereof (such approval not to be unreasonably or arbitrarily withheld) and satisfying the Vendor that the value thereof when erected shall not be less than the sum of \$70,000.00 as at a base date of 1st June 1984 increased by the same percentage increase in the Modal House Building Cost defined from time to time by the New Zealand Institute of Valuers between the said bases date and the date on which the Vendor’s approval is obtained **PROVIDED ALWAYS** that the criteria to be applied by the vendor in approving the plans as aforesaid shall be those set down by the New Zealand Institute of Valuers in its Modal House Building Cost Data.
- (ii) That he will not erect or place or permit or cause to be erected or placed upon the said land any caravan hut or shed to be used as a dwelling or temporary dwelling.
- (iii) That he will not erect or permit or cause to be erected or building any building or other structure on the said land or any part thereof nor will he allow or permit or cause any tree or shrub to grow thereon so that any such building or structure

(exclusive of any chimney stacks, plumbing pipes and television aerials affixed thereto) or any tree or shrub shall project or extend as to the said land beyond the height above or below the Rembrandt Subdivision Datum more particularly prescribed for each individual Lot in the Schedule contained in the said Agreement.

[8] Similar covenants were inserted in the Memoranda of Transfer under which Land Projects Ltd transferred the other properties affected by this application to the same third party.

[9] Land Projects Limited was removed from the Register of Companies in February 1992, almost 20 years ago. Although there is no evidence to confirm this, it appears likely that the company was wound up prior to the date on which it was moved from the Companies Register.

Relevant principles

[10] Sections 316 and 317 provide as follows:

316 Application for order under section 317

- (1) A person bound by an easement, a positive covenant, or a restrictive covenant (including a covenant expressed or implied in an easement) may make an application to a court for an order under section 317 modifying or extinguishing that easement or covenant.
- (2) That application may be made in a proceeding brought by that person for the purpose, or in a proceeding brought by any person in relation to, or in relation to land burdened by, that easement or covenant.
- (3) That application must be served on the territorial authority in accordance with the relevant rules of court, unless the court directs otherwise on an application for the purpose, and must be served on any other persons, and in any manner, the court directs on an application for the purpose.

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.

[11] Mr Keall contends on Mr Latter's behalf that jurisdiction exists under s 317(1)(a)(iii) for the first two covenants to be extinguished because of changes in circumstances that have occurred since they were registered. He contends that jurisdiction exists to extinguish the third covenant on the same grounds and also on the ground that the owners of four of the properties in whose favour the covenant was granted have consented to its extinguishment. He says those owners who have taken no steps to oppose the application may reasonably be considered by this omission to have abandoned or waived any rights they might have in relation to the covenants. Mr Latter therefore argues that jurisdiction also exists to extinguish the third covenant under s 317(1)(c)(i) and (ii).

[12] The leading authority regarding the approach to be taken in determining an application for orders under ss 316 and 317 is the judgment of the Supreme Court in *Synlait Milk Ltd v New Zealand Industrial Park Ltd*.¹ In that case the Court observed that s 317 requires a two-stage approach. The court must first determine whether the discretion to extinguish the covenant at issue should be exercised (and if so whether compensation should be payable). The exercise of the discretion then requires consideration of all relevant factors (including the power to award compensation).²

[13] The Court also observed that the importance of contractual and property rights is not to be ignored. These may be significant where the original parties to the covenant are also the parties to the application. However, such rights must be considered as part of the factual context before the court, rather than as generic fetters on the court's discretion. Each case must therefore be considered on its own merits.³

The first covenant

[14] This covenant required the Transferees of the land to obtain the approval of the Vendor (as distinct from the Transferor) to the plans for the construction of any house on the land and to satisfy the Vendor that cost of constructing the house was at least \$70,000 using a base date of 1 June 1984.

[15] The condition was plainly inserted for the sole benefit of Land Projects Limited, which was both the Transferor under the Memorandum of Transfer and the vendor in the preceding agreement for sale and purchase. Given that Land Projects Ltd is no longer in existence it is plainly not capable of taking advantage of the benefit accorded to it by the covenant. Furthermore, a substantial dwelling has already been constructed on Mr Latter's property and no party has objected to that occurring. Given these changes of circumstance it is both appropriate under s 317(1)(a)(iii) and just and equitable under s 317(1)(f) to make an order extinguishing this covenant.

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

² At [88]-[90].

³ At [88].

The second covenant

[16] This covenant was obviously designed to ensure that any owner of Mr Latter's property would not use a caravan, hut or shed on the property as a dwelling or temporary dwelling. This covenant has no ongoing utility because, as I have already observed, a dwelling has already been erected on Mr Latter's property. There is no realistic prospect that future owners of the property will endeavour to use a caravan, hut or shed on it as a dwelling or temporary dwelling. This change in circumstances renders it appropriate to make an order extinguishing the covenant under s 317(1)(a)(iii) and it is also just and equitable to make such an order under s 317(1)(a)(f).

The third covenant

[17] This covenant was obviously designed to preserve the views enjoyed by the occupants of surrounding properties. This was no doubt considered important because all the properties subject to the restrictive covenants have extensive views to the west over the Waitemata Harbour. As a result, any high rise development, or any trees that are permitted to grow above a certain height, may impede the views enjoyed by neighbouring properties. This could result in a loss of amenity value for those properties and/or diminution in their value. This means the present application has the potential to affect both the present and future owners of the properties that enjoy the benefit of the covenant over Mr Latter's land. The Court must therefore be sure jurisdiction exists to remove the covenant and also that it is appropriate to exercise the discretion under s 317 in Mr Latter's favour.

Preliminary issue

[18] Mr Latter initially advanced this aspect of the application on the basis that it was no longer possible to give effect to the covenant because its terms were too uncertain. This argument assumed that it is no longer possible to identify the Rembrandt Subdivision Datum referred to in the covenant because the original sale and purchase agreements are no longer in existence. Without this information it would not be possible to calculate whether the height of any a tree or structure was in breach of the covenant.

[19] When the matter was first called on 16 December 2021 counsel for Doromay submitted that it is likely documents are still in existence that would contain this information. I accept that this may be so. I therefore put the argument based on uncertainty to one side.

Jurisdiction

[20] As I have already observed, Doromay has formally consented to an order being made extinguishing all three covenants. The issue the Court must now determine is whether jurisdiction exists under s 317(1)(c) of the Act to make an order extinguishing the third covenant and thereby depriving the remaining eight owners of the benefit of it. This requires a determination as to whether those owners have either consented to the application or may reasonably be considered to have abandoned or waived their rights under the covenant. Alternatively, a change in circumstances may justify its extinguishment under s 317(1)(a)(i) and/or (iii).

[21] Prior to the first call of the proceeding on 16 December 2021 the owners of three of the remaining properties had purported to provide written consents to the extinguishment of the covenant. Van Bohemen J was concerned, however, that letters Mr Latter's solicitors had sent to the owners of the remaining properties may not have adequately explained the effect of what Mr Latter was seeking to achieve. In addition, Doromay had provided the Court with material suggesting that the terms of the third covenant were not void for uncertainty as Mr Latter had originally claimed. This obviously raised an issue regarding the validity of the written consents the three owners had provided. It also prompted Mr Latter to file an amended application in which he also relied upon any failure to oppose the amended application as amounting to an abandonment or waiver of the rights bestowed by the covenants.

[22] Van Bohemen J therefore issued a detailed Minute on 17 December 2021 explaining what had occurred. He directed that copies of his Minute, the amended application and the material Doromay had filed be served on the remaining owners. He also directed that any owner who wished to object to the application should file and serve documents in opposition by 5 pm on 12 January 2022.

[23] The documents were duly served on the remaining owners between 18 and 20 December 2021. No documents in opposition have been filed. I therefore proceed on the basis that the respondents have elected not to oppose the application even though they are now aware of all the material before the Court. I am also satisfied that those owners who had provided written consent to the application prior to the initial hearing maintain their consent to the application in its amended form and notwithstanding the material now before the Court. Furthermore, I am satisfied that the remaining owners have elected not to oppose the application in the knowledge that the Court is likely to treat this as a waiver or abandonment of their rights under the third covenant. I consider this omission may reasonably be considered a waiver or abandonment of their rights under that covenant. Jurisdiction therefore exists under s 317(1)(c)(i) and (ii) to make the orders Mr Latter seeks.

[24] I also accept the submission for Mr Latter that matters have moved on considerably since 1985 when the covenants were registered. At that time all the sections that had the benefit of the covenants were likely to have been bare land. It would no doubt have been a comfort to purchasers to know that height restrictions applied to other sections in the vicinity. This lessened the risk that sections could lose their views of the harbour through the construction of tall buildings on surrounding properties.

[25] All the properties that enjoy the rights conferred by Mr Latter's covenant now have dwellings constructed on them. In undertaking the site visit I was immediately able to appreciate why none of the remaining owners has taken steps to oppose to the application. The property most likely to be affected by any future development of Mr Latter's land is Lot 100, which adjoins Mr Latter's property to the north. However, Lot 100 does not enjoy the benefit of the covenant, possibly because Land Projects Ltd did not own it when it undertook the subdivision in 1984. Thereafter the properties likely to be most affected by future development of Mr Latter's property are Lots 96, 97 and 98. They are directly behind Mr Latter's property and look over it in an easterly direction towards the harbour. However, each of those properties is elevated substantially above Mr Latter's property and their views could never be built out.

[26] The remaining properties (Lots 101, 102, 103, 104 and 105) are situated some distance to the north of Mr Latter's property. The dwellings constructed on those properties face to the east in order to capture the views of the harbour in that direction. All but Lot 101 would have no view of Mr Latter's property at all. It is also unlikely that the owner of Lot 101 would be able to see much of Mr Latter's property because Lot 100 is situated between Lot 101 and Mr Latter's property. The dwelling constructed on Lot 100 largely shields Lot 101 from any view of Mr Latter's property. The owners of Lot 101 have in any event consented to the present application. The development of the surrounding properties since 1985 has therefore effectively resulted in making them immune from the effects of any future development of Mr Latter's property.

[27] The prospect of such development appears in any event to be very limited. The existing dwelling takes up virtually the whole of the site other than for a large open carport located at the rear of the address. There is a small area of land at the front of the property that fronts onto a recreation reserve. However, it is unlikely that this land could be developed because of its small size and difficulties with access. Furthermore, as I understand the position, the dwelling currently situated on Mr Latter's property is built to the maximum height currently permitted by territorial bylaws.

[28] For these reasons I have concluded that the development of the properties in the subdivision amounts to a change in the character of the neighbourhood that has effectively removed the utility of the third covenant. Jurisdiction to extinguish the covenant therefore also exists under s 317(1)(a)(ii) and (iii).

Exercise of the discretion

[29] The same factors are equally relevant to the exercise of the Court's discretion. In my view the third covenant has no further utility and should now be extinguished. It follows that I am satisfied the Court should exercise its discretion in favour of the applicant.

Result

[30] The application is granted. I make an order that the restrictive covenants currently registered against the title to Mr Latter's property (Identifier NA 57A/1320) in Transfer B470495.2 are extinguished.

Lang J

