IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-1584
[2023] NZHC 1070

BETWEEN	CHANDLER FARMS LIMITED Applicant
AND	RACHEL ANNE LOUISE PETTERSON, LEIGH ANNE TAYLOR, and PAUL STEVEN TAYLOR First Respondent
	BRIDGET JUDY LEM, DANIEL LORNE LEM and SANDRA LEE LEM as trustees of THE CALDERA TRUST Second Respondents

Hearing:	2 March and 3 May 2023
Appearances:	P Chisnall for Applicant M D Branch and K F Shaw for First Respondents No appearance for Second Respondents (no steps taken)
Judgment:	8 May 2023
Reissued:	30 May 2023

JUDGMENT OF LANG J
[on application for modification and extinguishment of restrictive covenants]

This judgment was delivered by me on 8 May 2023 at 2.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Duncan Cotterill, Wellington
Harkness Henry, Auckland

P Chisnall, Wellington

[1] Chandler Farms Limited (Chandler Farms) is the owner of a farm property situated in Karaka. It purchased the property in July 2011. At that stage it comprised 26.91 hectares and was being operated as a dairy farm. There was no dwelling on the property at that time.

[2] Between 2013 and 2015 Chandler Farms subdivided the property into three sections. Two of these, Lots 1 and 2, were approximately 1.2 hectares in size. The remaining section, Lot 3, was approximately 24.4 hectares in size. Chandler Farms proposed to continue using Lot 3 as a dairy farm and to sell Lots 1 and 2 as residential lifestyle properties.

[3] In 2015 Chandler Farms agreed to sell Lot 2 to the first respondents, who are the trustees of the Taylor Family Trust (the Taylor trustees). Chandler Farms then entered into an agreement in 2016 to sell Lot 1 to the second respondents, who are the trustees of the Caldera Family Trust (the Caldera trustees).

[4] At the time Chandler Farms sold Lot 2 to the Taylor trustees, a set of restrictive covenants was registered against the land. These were designed to protect the amenity value of the area in which the farm and the two sections were situated. Subsequently, following discussions between Chandler Farms and the Caldera Trustees immediately before settlement of the sale of Lot 1, a second restrictive covenant was registered over Lot 1.

[5] The first restrictive covenant imposes significant restrictions on all three sections in the subdivision. These include a prohibition on building more than one dwelling on each section and a prohibition on carrying out commercial activities on the land. Further subdivision of each section is also prohibited.

[6] Chandler Farms contends that the restrictive covenants, as finally registered, do not reflect the intentions of the parties during the period leading up to registration. It says all parties anticipated that only Lots 1 and 2 were to bear the burden of the restrictive covenants. Lot 3 was not to be subject to them. Chandler Farms contends

that Lot 3 has been made subject to the covenants because of a drafting error by the solicitors who acted on its behalf in preparing the covenants.

[7] In this proceeding Chandler Farms seeks orders under ss 316 and 317 of the Property Law Act 2007 (PLA) modifying the first covenant and extinguishing the second. The Caldera trustees have taken no steps in the proceeding, but the Taylor trustees oppose the application.

[8] At the conclusion of the evidence on 2 March 2023 I advised counsel and the parties of my tentative factual conclusions. I then adjourned the hearing to enable the parties to attempt to resolve the proceeding in light of these. Regrettably the parties were unable to reach agreement and it was necessary for me to resume the hearing on 3 May 2023.

Issues

[9] The proceeding raises the following issues:

1. What was the intention of the parties when the first covenant was registered?

2. Should the first covenant be modified under s 317 of the PLA?

3. Should the second covenant be extinguished?

The covenants

The first covenant

[10] The first covenant was created at a time when Chandler Farms owned all three sections. It was therefore both the grantee and grantor under the covenant.

[11] The restrictions imposed by the covenant may be summarised as follows:

(a) Restrictions on the nature, height and location of any dwellings or storage tanks that might be built on the property;

(b) A prohibition on using the property for trading or commercial purposes including the erection of advertising signs;

(c) A prohibition on further subdividing the property;

(d) A prohibition on building more than one dwelling on each property;

(e) Restrictions on the building materials that could be used to construct any dwelling or fencing;

(f) Restrictions on the erection of temporary buildings, garden sheds, solar panels and satellite dishes;

(g) Restrictions on landscaping activities;

(h) Building, utilities and roading maintenance obligations;

(i) Restrictions on vehicular access and parking.

The second covenant

[12] Chandler Farms registered the second covenant against the titles to Lots 1 and 3 (but not Lot 2) on 16 September 2016, immediately before it settled the sale of Lot 1 to the trustees of the Caldera Trust. The second covenant was intended to vary the first covenant by permitting the owner of Lot 1 to erect a "barn style" garage and accommodation structure on Lot 1. However, Chandler Farms subsequently discovered that registration of the second covenant resulted in the first covenant being unenforceable as between it and the trustees of the Caldera Trust. Chandler Farms now seeks an order extinguishing the second covenant.

What was the intention of the parties when the first covenant was registered?

[13] It is necessary to deal with this issue first because it is the subject of a factual dispute that is material to the outcome of the proceeding.

[14] The issue arises out of the fact that the first covenant was registered against all three sections created by the subdivision. Chandler Farms maintains that it always intended the first covenant to impose restrictions on the newly created Lots 1 and 2, but to leave intact its ability to deal with Lot 3.

[15] The Taylor trustees say they never shared this intention and that they expected all three properties to be bound by the same restrictions. They say they took the final form of the covenants at face value given that they were prepared by Chandler Farms' solicitors. They therefore believed Lot 3 was to be subject to the same restrictive covenants as Lot 2. The Caldera trustees have provided no evidence as to their knowledge and intentions.

[16] In resolving this issue, the process by which the restrictive covenants came to be registered is instructive.

[17] Chandler Farms and the Taylor trustees signed an agreement for sale and purchase on 31 August 2015. This contained a clause making the contract conditional on the purchasers approving restrictive covenants to be registered against the titles to the sections created by the subdivision. Chandler Farms was required to provide the Taylor trustees with draft covenants for their approval within 20 working days of the date of the agreement.

[18] Ms Rachel Chandler, one of Chandler Farms' directors, forwarded a set of draft covenants to Blackman Spargo, the solicitors acting for the Taylor trustees on the purchase, on 28 September 2015. The document began as follows:

> **PROTECTIVE COVENANTS**
>
> **Grantee:** Chandler Farms Limited
>
> **Grantor:** All Purchasers
>
> The following Protective Covenants and design requirements have been developed to assist purchasers, their designers and builders understand the building and environmental requirements prior to purchasing a property at Galloway Road, Karaka. These Protective Covenants are important for the overall design and will help protect and enhance the value of each buyer's individual investment.
>
> These Protective Covenants will be registered on the title for the property.

The Grantor and their successors in the title SHALL NOT:

1.0 Dwelling

1.1 Build a dwelling less than 300 sqm of living area (excluding decks and any ancillary buildings);

1.2 Build a dwelling with less than three roof planes (other than a flat roof);

1.3 Erect on the Lot, a dwelling greater in height than a single storey in accordance with Council Subdivision approval;

1.4 Situate a dwelling outside of the designated building site (if applicable) in accordance with Council Subdivision approval.

…

The document went on to impose the restrictions summarised above.

[19] The document prepared by Ms Chandler subsequently formed the basis of further negotiations between Blackman Spargo and Jones Young, the law firm acting for Chandler Farms on the sale, between 30 September and 15 October 2015. The negotiations related to individual covenants and not to the fact that the covenants were to be given by the purchaser to Chandler Farms and not vice versa. There is no suggestion in any of the correspondence that passed between the two firms of solicitors during this period that Lot 3 was to be subject to the covenants.

[20] On 15 October 2015 Jones Young sent Blackman Spargo a draft set of restrictive covenants in registrable form. The covenants had been amended to reflect agreement reached on various issues during the preceding weeks. The letter enclosing the covenants summarised the changes that had been made to them as follows:

3. A copy of the amended land covenants are attached incorporating the following:

- Clause 2.1(f) has been amended to practical completion and final inspection by Council

- Clause 2.2 has been amended into a separate paragraph

- Typographical errors have been corrected.

- Clause 6.2 has been amended to state that the immediate area around the house is not to exceed 150 mm.

[21] The letter did not suggest the covenants had been amended to make Lot 3 subject to them. However, Schedule A to the document read as follows:

Grantor

CHANDLER FARMS LIMITED

Grantee

CHANDLER FARMS LIMITED

Grant of Easement or *Profit ā prendre* or Creation of Covenant

The Grantor being the registered proprietor of the servient tenement(s) set out in Schedule A **grants to the Grantee** (and, if so stated, in gross) the easement(s) or *profit(s) ā prendre* set out in Schedule A, **or creates** the covenant(s) **set out** in Schedule A, with the rights and powers or provisions set out in the Annexure Schedule(s)

Schedule A Continue in additional Annexure Schedule, if required

Purpose (Nature and extent) of easement; *profit or covenant*	Shown (plan reference)	*Servient Tenement (Computer Register)*	*Dominant Tenement (Computer Register) or in gross*
Land Covenant		**693466 to 693468 (inclusive)**	**693466 to 693468 (inclusive)**

[22] The numbers in the boxes marked "Servient Tenement" and "Dominant Tenement" relate to the new titles that were to issue for the subdivided sections. Lot 1 had been allocated a new title numbered 693466 whilst Lots 2 and 3 had been allocated the title numbers 693467 and 693468 respectively.

[23] Furthermore, Schedule B contained the following definitions:

SCHEDULE B

1.0 DEFINITIONS AND INTERPRETATION

In this instrument, unless the context requires otherwise:

Benefiting Lot(s) means any on the lots 1 to 3 (inclusive)

Covenanting Lot(s) means any one of the lots 1 to 3 (inclusive)

Grantee means the register proprietor of the Benefiting Lots;

Grantor means the registered proprietor of the Covenanting Lots and includes the agents, employees, contractors, tenants, licensees and other invitees of the grantor

…

[24] As can be seen, the combined effect of these provisions was to make Lot 3 subject to the same restrictive covenants as applied to Lots 1 and 2. This occurred without any prior discussion between the parties. Given that fact, I have no doubt it was caused by a drafting error by the person who prepared the document. The mistake was then perpetuated in the document that Jones Young ultimately lodged for registration.

[25] The fact that Lot 3 was made subject to the restrictive covenants through error is further reflected by the wording used in the covenant restricting further subdivision of the property. This reads as follows:

[The Grantor shall not]

10.0 Subdivision

10.1 Further subdivide the property whether by way of cross-lease, unit title, subdivision into separate lots or in any other way. Only one new single private residential dwelling is permitted on each Lot;

> 10.2 Oppose, frustrate, object to, nor take any action or encourage others to oppose, frustrate, object or take any action that might, in any way, prevent or hinder the Grantee and/or the Local Authority from progressing with any further subdivision. This covenant extends to and includes (but is not limited to) development planning, zone changes, resource consents, Consent Authority or Environment Court Applications, Building Consent matters, or any consents, earthworks, developments and general works. The benefit of this covenant applies to any adjoining or neighbouring properties now or hereafter owned by the Grantee, it subsidiaries or associated entities.

[26] This clause adopted the wording used in earlier versions of the Protective Covenants that formed the basis of the parties' negotiations before Jones Young prepared the instrument that was ultimately registered. Under these provisions, which remained in the same format throughout, the Grantor (being the purchaser) agreed not to further subdivide the section it was purchasing and also agreed not to frustrate or obstruct the Grantee (Chandler Farms) in further subdividing its property. Clause 10.2 of the registered covenants obviously makes sense if Lot 3 was not subject to the covenant prohibiting further subdivision. It does not make sense, however, if Lot 3 is subject to that covenant.

[27] The issue of future subdivision of Lot 3 had been the subject of correspondence between the parties' solicitors before Jones Young prepared the registrable instrument. On 9 October 2015 Ms Rachel Petterson, who was both a director of Blackman Spargo and a trustee of the Taylor Trust, wrote to Jones Young raising issues about several aspects of amended draft Protective Covenants she had received from Jones Young on 5 October 2015. This included clause 9.0, which was worded identically to clause 10.0 of the covenants that were ultimately registered.[1] Ms Petterson sought advice from Jones Young about the issue of future subdivision of Lot 3 as follows:

> **5. Subdivision**
>
> 5.1 Please confirm your client's intention in relation to clause 9.2 and your client's further subdivision proposals. My clients understand that there is one further potential lifestyle subdivision available to your client's land of approximately 1 hectare. Please advise if this is incorrect.

[28] In their letter sent in response on 15 October 2015 Jones Young advised:

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[1] Set out above at [25].

6. Your client is correct that our client intends to further subdivide the property.

[29] It is possible that Ms Petterson's letter dated 9 October 2015 was referring to Lot 1 rather than the subdivision of further sections from Lot 3. However, the open-ended nature of Jones Young's response ought to have alerted the Taylor trustees to the likelihood that Chandler Farms was contemplating the subdivision of further sections from Lot 3. If the restrictive covenants applied to Lot 3 it would have no ability to subdivide the property further. It appears that Blackman Spargo never responded to the advice given in the letter received from Jones Young on 15 October 2015. This suggests Blackman Spargo and the Taylor trustees accepted that Chandler Farms was entitled to subdivide Lot 3 further.

[30] I have concluded that the restrictive covenants as registered did not reflect the basis on which the parties had proceeded in unison up until that point. Up until 15 October 2015 there was never any suggestion that Lot 3 would be subject to the restrictive covenants. Had the Taylor trustees wished the covenants to extend to Lot 3 they would undoubtedly have raised the issue in the correspondence that occurred during this period. The fact that they did not do so speaks volumes about their knowledge and intentions.

[31] Furthermore, in the absence of any discussion about the issue it is inconceivable that Chandler Farms would voluntarily consent to such significant restrictions on its future ability to deal with Lot 3. There would be no logical reason for it to abandon its stated intention of subdividing the property further or being restricted to erecting no more than one dwelling on such a large parcel of land. There is also no reason why Chandler Farms would agree to cease using the property for commercial purposes as a working farm given that it used the property in that way for many years.

[32] It follows that I am satisfied the covenants do not reflect the intention of the parties when they entered into the agreement for sale and purchase or when the Taylor trustees approved the restrictive covenants in their final form. Throughout this period all parties knew and intended that Lot 3 would receive the benefit of the covenants but was not to be subject to them.

[33] It appears that no one realised the error had been made until approximately August 2016 after Chandler Farms had obtained a resource consent enabling it to subdivide Lot 3 further. At that point the error became apparent, and Chandler Farms endeavoured to obtain the consent of both sets of trustees to exclude Lot 3 from being subject to the covenants. These efforts were ultimately unsuccessful so far as the Taylor trustees were concerned.

Should the first covenant be modified under s 317 of the Property Law Act 2007?

[34] Sections 316 and 317 of the PLA 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.

[35] The leading authority regarding the approach to be taken in determining an application for orders under s 317 is the judgment of the Supreme Court in *Synlait Milk Ltd v New Zealand Industrial Park Ltd.*[2] In that case, the court observed that s 317 requires a two-stage approach.[3] The Court must first determine whether jurisdiction exists under one or more of the grounds set out in s 317(1) to make the order sought. If so, the Court will consider whether to exercise its discretion to modify or extinguish the covenant in question. The exercise of the discretion requires the Court to consider all relevant factors (including the power to award compensation).[4]

Preliminary issues

[36] I deal first with some preliminary issues. The first is a submission for the Taylor trustees that relief is not available under s 317 because the parties were not subject to or influenced by the same mistake. Mr Branch submits that his clients always believed the restrictive covenants would apply to Lot 3 as well as Lots 1 and 2. The conclusion I have reached regarding the parties' intentions effectively answers

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2 *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657.
3 At [67] and [90].
4 At [90].

this submission. I am satisfied the Taylor trustees knew and intended that the restrictive covenants would apply only to their section and not to Lot 3.

[37] Mr Branch also submits that Chandler Farms ought to have commenced a proceeding alleging mutual mistake and seeking relief under s 28 of the Contract and Commercial Law Act 2017. Alternatively, Chandler Farms could have sought rectification of the restrictive covenant. It is now too late for Chandler Farms to take either of those steps because they would be subject to limitation defences. Mr Branch submits that in those circumstances, Chandler Farms should not be permitted to use the originating application procedure seeking orders under s 317.

[38] The short answer to this submission is that Chandler Farms is entitled to bring the present application, notwithstanding the fact that other avenues may have been open to it.

[39] Mr Branch also submits that the procedure under s 317 is only available to deal with changes of circumstance that occur following registration of a restrictive covenant. Any other approach fails to give sufficient weight to the principle of indefeasibility of title.

[40] I do not accept this submission. There have been several cases in which the court has exercised its powers under s 317 to rectify situations caused by drafting errors in documents creating restrictive covenants.[5] By way of example, in *LMM Investments Ltd v Cumming* a restrictive covenant had mistakenly been registered against land retained by a developer for future subdivision purposes.[6] The covenant prohibited further subdivision of the land for a period of ten years. Mander J accepted that grounds existed for modification of the covenant under s 317(1)(a), (b), (d) and (f) of the PLA.[7] He then modified the covenant by excluding the land retained by the developer from being subject to it.[8]

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5 *Nova Scotia River Estates Ltd v Whangarei District Council* [2017] NZHC 196, *LMM Investments 2012 Ltd v Cumming* [2021] NZHC 3238; *Manawa Development Holdings Ltd Partnership v Tauranga City Council* [2022] NZHC 2138.

6 *LMM Investments 2012 Ltd v Cumming,* above n 5.

7 At [14].

8 At [17].

Analysis

Section 317(1)(a) – change of circumstances since creation of covenant

[41] I do not consider that s 317(1)(a) applies in the present case because there has not been a change in any of the circumstances set out in that subsection since the covenants were registered.

Section 317(1)(b) – unforeseen impediment to reasonable use of the land

[42] It can be argued that s 317(1)(b) is engaged because Chandler Farms believed when it registered the restrictive covenants that Lot 3 would not be subject to them. This has transpired not to be the case. As a result, Chandler Farms now faces considerable restrictions on the use it may make of its property. It can no longer use it for commercial purposes as a farm, as has been the case previously, and it cannot subdivide the section further. Nor can it build more than one house on the property. The size of the property and the fact that it has always been used for farming purposes means that commercial farming activities must constitute a reasonable use of the land. The same must apply to the ability to subdivide the property further and to build more than one dwelling on it. It can therefore be argued that if the covenants continue in force Chandler Farms will be impeded in the reasonable use it can make of its property.

[43] However, s 317(1)(b) applies to situations where reasonable use of land has been impeded by a change in circumstances that was not reasonably foreseeable when the covenant was created. That is not the case here. The impediment to the reasonable use of the land has not been caused by an unforeseeable change in circumstances since the covenants were registered. Rather, it has been caused by the nature and effect of the covenants at the time they were created. For this reason, s 317(1)(b) does not apply in the present case.

Section 317 (1)(c) – consent given by all parties affected by the covenant

[44] This subsection plainly does not apply because the Taylor trustees do not consent to the extinguishment or modification of the covenant.

Section 317(1)(d) – no substantial injury to any other person

[45] For an injury to be substantial in terms of s 317(1)(d), it must be "real, considerable, significant, as against insignificant, unreal or trifling".[9]

[46] I consider this subsection is engaged because the Taylor trustees will not be substantially injured if the covenant is modified so that it no longer applies to Lot 3. Their obligations will remain unchanged. They will no longer receive any benefit that may have flowed from the covenant applying to Lot 3, but my factual conclusions mean they never expected to receive those benefits. An order removing the burden of the covenant from Lot 3 would merely restore the situation to that anticipated by the parties at the time the registrable document was prepared.

Section 317(1)(e) – covenant contrary to public policy or law

[47] This subsection does not apply.

Section 317(1)(f) – it is just and equitable to extinguish or modify the covenant

[48] Not surprisingly, the PLA does not contain any definition or guidance as to when it will be just and equitable to modify or extinguish a restrictive covenant. This no doubt reflects Parliament's intention that the Court should have the ability to make orders under s 317 in deserving cases that do not fall within the preceding subsections. Before doing so, however, it must be satisfied that it is just and equitable to make such orders.

[49] In other cases where problems have arisen because of an error in drafting a restrictive covenant, the Court has concluded it would be just and equitable to make an order under s 317.[10] I take the same approach in the present case. All parties knew and intended that Chandler Farms was to receive the benefit of the restrictive covenants that burdened Lots 1 and 2 but was not to be subject to a corresponding obligation for Lot 3. The situation that has now arisen has been caused by the inadvertence of Chandler Farms' solicitors and not through any fault or wrongdoing

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9 *Synlait Milk Ltd v New Zealand Industrial Park Ltd,* above n 2, at [103].

10 *LMM Investments Ltd v Cumming,* above n 4, at [14](f); *Manawa Development Holdings Ltd v Tauranga City Council,* above n 4, at [19].

on its part. There is no reason why it should be significantly penalised by continuing to be subject to the burden of the restrictive covenants registered in error over Lot 3. It is just and equitable that the position be restored to that which the parties intended.

Exercise of the discretion

[50] As the Supreme Court pointed out in *Synlait,* once the Court has found grounds established under s 317(1) it will often exercise its discretion in favour of the applicant. In this context the Court observed:[11]

> [168] In *Re University of Westminster*, the Court of Appeal of England and Wales observed, in relation to the equivalent United Kingdom provision, that "[a] finding of fact that one or more of the statutory grounds exists is likely, of itself and without more, to provide a good reason or reasons for making an order". That appears to reflect the approach to cases under s 317 and its predecessors. Indeed, Mr Miles told us there are no New Zealand cases where the court, having round that one (or more) of the grounds in s 317(1) has been made out, has exercised its discretion to refuse to extinguish or modify the easement or covenant.

[51] The Supreme Court also noted that, in cases where the Court has found grounds have been established under s 317(1)(f), it will already necessarily have concluded it is just an equitable to make the order sought.[12]

[52] On the basis of my reasoning in finding grounds established under s 317(1)(d) and (f) I am also satisfied it is appropriate to exercise the discretion in favour of Chandler Farms. For the same reasons, I do not consider Chandler Farms should be required to pay and compensation to the Taylor trustees under s 317(2) of the PLA. That would amount to an unjustifiable windfall for the Taylor trustees.

The second covenant

[53] As I have already observed, the second covenant was registered when the Caldera trustees purchased Lot 1. The parties miscalculated the consequences that registration of the second covenant would produce. This has resulted in the first covenant becoming entirely unenforceable as between the Caldera trustees and Chandler Farms.

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11 *Synlait Milk Ltd v New Zealand Industrial Park Ltd,* above n 2. Footnote omitted.
12 At [67], n 30.

[54] The Caldera trustees have taken no steps to oppose Chandler Farms' application for an order extinguishing the second covenant. This would result in the situation reverting to that which existed prior to the registration of that covenant.

[55] I am satisfied that it is just and equitable to make the order sought given the unintended consequences flowing from registration of the second covenant. It is also appropriate to exercise the discretion in favour of that application.

Orders

[56] I make an order under s 317(1) of the PLA modifying the covenant registered under Easement Instrument Number 10116583.8 against Records of Title, 693466, 693467 and 693468 (North Auckland Registry) by excluding the land described in Lot 3 on Deposited Plan 486417 and being the land comprised in Record of Title 693468 as a servient tenement and as a covenanting lot under the covenant.

[57] I make a further order under s 317(1) of the PLA extinguishing the covenant registered under Easement Instrument Number 10562938.2 against Records of Title 693466 and 693468 (North Auckland Registry).

[58] I reserve leave to Chandler Farms to seek any further or ancillary orders that may be required to implement the orders I have made.

Costs

[59] Chandler Farms has been the successful party and is entitled to an award of costs and disbursements in its favour. If the parties cannot reach agreement regarding costs, they have leave to file concise memoranda dealing with that issue and I will determine costs on the papers.

Lang J