IN THE COURT OF APPEAL OF NEW ZEALAND

CA185/2014
[2015] NZCA 393

BETWEEN	BODY CORPORATE 341188 First Appellant
	GEORGE VICTOR WILKINSON AND JEREMY K COLLINGE AND OTHERS Second – Eleventh Appellants
AND	DISTRICT COURT AT AUCKLAND First Respondent
	ESCROW HOLDINGS FORTY-ONE LIMITED Second Respondent
	KALLINA LIMITED Third Respondent
	AUCKLAND COUNCIL Fourth Respondent
	CHANG TJUN CHONG & OTHERS Fifth – Thirtieth Respondents

Hearing:	19 May 2015
Court:	Ellen France P, Courtney and Kós JJ
Counsel:	G J Kohler QC and T M Bates for First to Eleventh Appellants T J Herbert for Second and Third Respondents
Judgment:	26 August 2015 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court is set aside.

C There are declarations in the terms set out at [53].

D The second and third respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

E Costs in the High Court are to be reconsidered by that Court in light of this judgment.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Ten unit owners of an apartment block claim the right to use a car park located on an adjoining site. A land covenant noted on the titles of both sites requires the owners of the apartment block to pay for the upkeep of the car park. The covenant also precludes the owners of the car park from allowing anyone other than the owners of the apartment block and one other building to use it. Nevertheless, the owners of the car park maintain that the unit owners have no right to use the car park.

[2] The Body Corporate of the apartment block and the unit owners[1] applied for declaratory relief regarding their rights and obligations. In the High Court Peters J found for the owners of the car park and held that the land covenant did not create any positive rights of access or use.[2]

---

1 Only the Body Corporate and the ten unit owners who are the second to 11th appellants participated in the proceeding; the fifth to 30th respondents are also unit owners but abided the decision of the High Court and took the same course in respect of the appeal.

2 *Body Corporate 341188 v District Court at Auckland* [2014] NZHC 442.

[3] The Body Corporate and the unit owners have appealed.[3] They assert error by the Judge in wrongly:

(a) taking a literal approach to the interpretation of the land covenant, notwithstanding the patently absurd result, and wrongly taking extrinsic evidence into account;

(b) failing to make orders that would enable the unit owners to access and use the car park; and

(c) alternatively, failing to make orders that would prevent the respondents from using or permitting the car park to be used for a purpose other than parking for the unit owners.

Background

The titles and the instruments

[4] The subject properties are adjoining rear sites in Hargreaves Street, Ponsonby, referred to as Lots 2, 3 and 4. The land was originally part of Lot 1 DP 113758. In 1989 it was subdivided into Lots 1, 2 and 3 DP 121257. There was a further subdivision of the new Lot 1 into Lots 4 and 5 DP 126975. This case concerns Lots 2 and 3 DP 121257 and Lot 4 DP 126975.

[5] The car parking building is located on Lot 4, closest to the road. Escrow Holdings Forty-One Ltd[4] (Escrow) and Kallina Ltd[5] (Kallina) each own an undivided half share of Lot 4. The apartment block is located on Lot 2, which lies to the rear of Lot 4 on its northern boundary. Lot 3, in turn, lies to the rear of Lot 2 on that site's northern boundary. There is a commercial building on Lot 3 owned by Escrow.

[6] In 1989, when Lots 2, 3 and 4 were created by the subdivision, the title to each half share in Lot 4 was amalgamated with the titles to Lots 2 and 3 respectively.

---

3 For convenience we refer to the appellants collectively as "the unit owners".
4 The second respondent.
5 The third respondent.

This amalgamation of titles was required as a condition of the subdivision that created Lot 4.

[7] A Memorandum of Encumbrance (CO79599.15) and Deed of Covenant[6] (CO79599.12) were, respectively, registered and noted against the amalgamated titles on 11 December 1989. The Memorandum of Encumbrance was executed by the owners of Lot 4 in favour of the Auckland City Council in consideration for the Council's consent to the subdivision. Under it, the owners promised to pay five cents per annum for 999 years on demand and not to allow Lot 4 to be used "for any purpose other than carparking or access for the benefit of Lots 2 and 3".

[8] The Deed of Covenant was expressed to be between the registered proprietor of Lot 2 and one of the half shares in Lot 4 on the one hand, and the registered proprietor of Lot 3 and of the other half share of Lot 4 on the other. The owners of Lots 2 and 3 covenanted to meet the operating expenses and outgoings for the car park and the owners of Lot 4 covenanted not to allow Lot 4 to be used for any purpose other than car parking for Lots 2 and 3.

[9] The title to Lot 3 and one undivided half share in Lot 4 is still amalgamated. Escrow is the registered proprietor. However, the other half share in Lot 4 has been de-amalgamated from the title to Lot 2. Now Lot 2 (owned by the unit owners) and the half share in Lot 4 (owned by Kallina) are registered on separate titles.

The procedural background

[10] How the title to Lot 2 came to be uncoupled from the title to the half share in Lot 4 is complicated and it is unnecessary to go into the detail here; it is sufficient to say that in 2005 the Council consented to the de-amalgamation of the titles and in 2011 the District Court made an order on the application of Kallina and Escrow extinguishing all the covenants contained in Deed of Covenant.[7] Those decisions were the subject of a judicial review application brought as part of this proceeding.

---

6 The document is actually headed "Memorandum of Land Covenants" but is in substance a deed.

7 Pursuant to s 316 of the Property Law Act 2007: *Escrow Holdings Forty-One Ltd v Auckland Council* DC Auckland CIV-2011-004-2002, 19 October 2011.

[11] In an interim decision Peters J quashed the District Court's order so that the covenant was restored to the title.[8] This background accounts for the presence of the Council and the District Court as respondents in this proceeding, though neither participated in the hearing, choosing to abide the decision of this Court. For convenience, when we refer to the respondents we mean only Kallina and Escrow.

The High Court decision

[12] In the High Court the Body Corporate and unit owners sought declarations as to the parties' rights and obligations under the Deed of Covenant and Memorandum of Encumbrance. They also sought a declaration that the respondents were estopped from denying the appellants the use of the formed driveways on Lot 4, on the basis of an equitable easement.

[13] Peters J rejected the argument advanced for the Body Corporate and the unit owners that because a literal reading of the covenant would result in an absurd outcome it should be interpreted as conferring positive rights on the owners of Lots 2 and 3 to enter and use Lot 4 for parking or, alternatively, that such rights should be implied. She accepted the argument advanced by Kallina and Escrow that the negative wording of the covenant indicated an intention not to confer any positive rights; had the parties to the covenant wished, they could have framed it in positive terms.[9]

[14] The Judge noted that it was common ground that the covenant did not confer an express right of parking or access on either of Lots 2 or 3 and that the issue was whether that omission should be cured by implication or otherwise.[10] She concluded that it could not:

> [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

---

8 *Body Corporate 341188 v District Court at Auckland* [2012] NZHC 2301.
9 *Body Corporate 341188 v District Court at Auckland*, above n 2, at [85].
10 At [84].

> an undivided half share in Lot 4, would include a right to travel over the land and to park anywhere thereon.[11]
>
> [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 … . Thereafter successors in title in respect of Lot 2, including the licensees, could only use the Carpark by a lease or licence from the registered proprietor(s) of Lot 4.

[15] Peters J also considered that although the Memorandum of Encumbrance did not confer on Lot 2 or 3 a positive right to access or to park on Lot 4, in the absence of prior consent from the Council nor could the registered proprietors of Lot 4 themselves use Lot 4 other than for car parking or access for the benefit of both Lots 2 and 3.[12] This finding did not, however, result in any injunctive relief for the appellants.

Interpreting the land covenant

The issue on appeal

[16] The parties accept that a literal reading of the covenant would produce an absurd result, namely that the unit owners must pay the costs associated with the car park without having any right to park there, while the owners of Lot 4 are prevented from allowing anyone other than the owners of Lots 2 and 3 to use the car park. Mr Kohler QC argued that a literal reading was not the correct approach and that either a black-letter interpretation or a purposive interpretation of the covenant would confer on the unit owners a positive right to access and use the car park. Alternatively, he contended that such a term should be implied. Either approach would avoid the patent absurdity.

[17] Mr Herbert submitted, however, that the instruments are to be interpreted against the factual matrix that existed in 1989 when the titles were first issued and, if approached on that basis, there was no absurdity. On his argument the absurdity that is now evident is solely the result of the de-amalgamation of the Lot 2 title from the half share in Lot 4, which was a matter outside the respondents' control.

---

11 *Fejo v Northern Territory of Australia* (1988) 95 CLR 96 at [43].
12 *Body Corporate 341188 v District Court at Auckland*, above n 2, at [72].

The relevant principles

[18] In New Zealand the interpretation of easements and covenants affecting land has been undertaken by the same objective, purposive approach taken for other commercial contracts[13] of identifying the parties' intentions by discerning "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[14] Care is required in concluding that the natural and ordinary meaning of the words read in the relevant context would produce a commercially absurd result, especially in formal documents, which can be expected to have been drafted with the intended meaning of the words being used firmly in mind, and because what may seem commercially absurd to one party is not necessarily absurd from the perspective of another.[15]

[19] A different approach may, however, be necessary in identifying the relevant context where the contract is likely to be relied on by third parties. In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* the Supreme Court cited Lord Collins' observations in *Re Sigma* in relation to the interpretation of a security trust deed:[16]

> Where a security document secures a number of creditors who have advanced funds over a long period it would be quite wrong to take account of circumstances which are not known to all of them. In this type of case it is the wording of the instrument which is paramount. The instrument must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the debtor's business. Detailed semantic analysis must give way to business commonsense … .

[20] The Supreme Court then observed:[17]

> To some extent, then, the scope for resort to background is itself contextual … . While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the

---

13 See for example *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZConvC 193,938 (CA); *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402; leave to appeal to Supreme Court refused in [2008] NZSC 51.

14 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14]; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

15 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 14 at [89]–[93].

16 At [62]; *Re Sigma Finance Corp (in admin rec)* [2009] UKSC 2, [2010] 1 All ER 571 at [37].

17 At [62]–[63] (footnote omitted).

> context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[21] We acknowledge that there are divergent views on the extent to which extrinsic evidence should be taken into account in interpreting instruments registered against a title.[18] The issue is one that a permanent court may wish to consider when a suitable opportunity arises but we do not need to consider that issue here. It is unnecessary in this case to take into account extrinsic evidence regarding the circumstances existing at the time of the subdivision of Lots 2, 3 and 4, nor later when the titles were de-amalgamated because we are satisfied that it would not alter the conclusion we have reached as to the ordinary and natural meaning of the words.

[22] We do, however, consider that there is a relevant statutory context; in the High Court and in this Court the argument focused on the wording of the Deed of Covenant but it is apparent from the wording of the Memorandum of Encumbrance that the two instruments are to be considered in conjunction and against the relevant provisions of the Land Transfer Act 1952 (LTA) and Property Law Act 2007 (PLA).

Nature of the instruments and the statutory context

[23] The Memorandum of Encumbrance, which imposed a rentcharge over Lot 4, was obviously drafted in accordance with form D in sch 2 of the LTA then in force.[19] The covenant contained in the Memorandum is a covenant in gross, provided for the benefit of the Council, but not in relation to land owned by the Council. The Memorandum of Encumbrance and the Deed of Covenant are intertwined, with the Deed of Covenant clearly entered into as means of ensuring compliance with the Memorandum of Encumbrance. As a result the Deed of Covenant, on which the case

---

[18] *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45, (2007) 233 CLR 528; *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324, [2008] NSW ConvR 56-200; *Big River Paradise Ltd v Congreve*, above n 13; *Thompson v Battersby* [2008] NZCA 84, (2008) 9 NZCPR 12; *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305; *Elwood v Goodman* [2013] EWCA Civ 1103, [2014] Ch 442.

[19] That and other forms in sch 2 were repealed as from 26 August 2002 by s 65(2) of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.

turns, is not to be interpreted in a vacuum but together with the Memorandum of Encumbrance.

[24] Historically, covenants in respect of land were binding on the parties to them but not necessarily on their successors in title. At common law the benefit of a covenant relating to land ran with the land but the burden did not, whether the covenant was positive (requiring a party to do something) or negative (requiring a party not do to something). Equity relaxed these rules so that the burden of negative covenants could also run with the land. However, before 1 January 1987 there was no satisfactory way of making the burden of a positive covenant run with the land.[20]

[25] This situation has been remedied by statute. Section 303 of the PLA provides that in certain circumstances the burden of positive covenants entered into after 1 January 1987 can be enforced against successors in title. Section 307 provides that notification of positive covenants entered into after that date and restrictive covenants entered into after 1 January 1953 can be entered in the register in respect of the burdened land, the benefited land or both.

[26] However, covenants in gross – that is, personal covenants binding only the particular land owner and not attaching to the land itself – are not enforceable at all against successors in title.[21] Nevertheless, they are commonly sought to be used by local authorities to impose requirements on land owners, including obligations associated with subdivisions.[22] One method of overcoming the barrier to enforcement of such covenants is the use of an encumbrance instrument, which is provided for in the LTA.[23] An encumbrance instrument is a mortgage for the purposes of both the LTA and the PLA.[24] It operates to secure a rentcharge or annuity and, relevantly, collateral covenants that are not otherwise registerable, such as covenants in gross.

---

20 This reflected the difficulty of supervising performance of positive obligations.

21 Though the Law Commission has recommended amendments to the Property Law Act 2007 to allow covenants in gross to be notified on the title. See Law Commission *A New Land Transfer Act* (NZLC R116, 2010), ch 7.

22 See the discussion in G W Hinde and others *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2014) at [16.040]–[16.041].

23 Land Transfer Act 1952, s 101.

24 Land Transfer Act, pt 6; Property Law Act, pt 3.

[27] The use of a memorandum of encumbrance for this purpose was discussed at length by the Court of Appeal in *Jackson Mews Management Ltd v Menere*[25] and by the Law Commission in its 2010 report *A New Land Transfer Act*.[26] The latter suggested that the prevalence of the device had been encouraged by Professor Brookfield in 1970 in his article "Restrictive Covenants in Gross":[27]

> Restrictive covenants in gross affecting land can, then, be effectively brought to the notice of persons dealing with the registered proprietor not by direct entry on the register but by the same means used for that purpose in respect of all types of restrictive covenants (other than fencing covenants) before the Property Law Act 1952 came into force. *One well known method is that of obtaining from the registered proprietor and registering a memorandum of encumbrance in Form D of the Second Schedule to the Land Transfer Act* adapted in the precedent at the end of the article by E C Adams "Memorandum of Encumbrance under the Land Transfer Act 1915" (1950) 26 NZLJ 171, 174. *In such a document the covenantor creates a defeasible rent-charge in favour of the covenantee, it being provided that the rent-charge is to be unenforceable as long as certain covenants affecting the covenantor's land are observed and performed.* The method is described more fully below. A defeasible memorandum of encumbrance of this type is registrable … *The memorandum of encumbrance may be used to secure the performance not only of the restrictive covenants but also of positive covenants. Of course no amount of notice will render the latter directly binding on the covenantor's assignees but the encumbering of the land with a sufficient rent-charge will ensure that they perform the substance of those positive covenants in order to avoid the operation of the encumbrance.*
>
> (emphasis added)

[28] In his analysis of the decision in *Jackson Mews*, Rod Thomas refers to this article and summarises the use of encumbrance instruments to secure collateral covenants:[28]

> Encumbrance instruments are a creature of the LTA. Created as a form of statutory mortgage, they can be used to charge the land with payment of a rent charge or annuity. Unlike mortgages, there is no advance to repay. Importantly, the charge can be created in perpetuity. …
>
> This outdated mode of security would be of little interest, were it not for s 203(1)(a)(ii) of the PLA. This is the successor of s 104(1) of the PLA 1952. Section 203 provides that all covenants contained in mortgage securities will bind purchasers of the charged property.

---

25 *Jackson Mews Management Ltd v Menere* [2009] NZCA 563, [2010] 2 NZLR 347. Leave to appeal to Supreme Court refused in *Jackson Mews Management Ltd v Menere* [2010] NZSC 39, [2010] 2 NZLR 347.

26 Law Commission, above n 21.

27 At [7.1] and [7.7]; F M Brookfield "Restrictive Covenants in Gross" [1970] NZLJ 67 at 70.

28 Rod Thomas "Encumbrance instruments" [2010] NZLJ 10 at 10.

> The latent potential in this provision was developed by Professor Brookfield at [1970] NZLJ 67. He suggested the section could be used to ensure local authority restrictions on land use were notated on the face of titles in terms that bound purchasers of the land. …
>
> The same reasoning that accepts this device can be used to bind successors in title to land covenants and council restrictions on land use, also extends to any other covenants, whether the covenant relates to the land, or is in gross. Because of the effect of s 203(1)(a)(ii), subsequent owners of the charged land can be obligated to carry out any obligation identified in the security.

[29] Despite the suggestion in Professor Brookfield's article that performance of a positive covenant could be secured by the use of an encumbrance instrument, the enforceability of positive covenants in gross remains less certain than that of negative covenants in gross; in 1985 the Property Law and Equity Reform Committee specifically recommended that positive covenants in gross, that is covenants not attaching to a particular piece of land but which require a land owner to perform a positive act, should not be recognised.[29]

[30] Whether a covenant is negative or positive depends on the substance, not merely the form, of the promise. In *Tulk v Moxhay*, for example, a covenant to keep certain land open and uncovered by buildings, although positive in its form, was held to be negative in its substance, its effect being to prohibit the covenantor from building on the land.[30] In *Shepherd Homes Ltd v Sandham (No 2)* Megarry J, considering a covenant that imposed both positive and negative obligations, said:[31]

> First, the question is not whether a covenant is negative in wording but whether it is negative in substance. This, indeed, is implicit in *Tulk v Moxhay* (1848) 2 Ph 774 itself … Second, what is worded or set out in the instrument as a single covenant may give rise to more obligations than one; and if one obligation is positive, that is no reason why another obligation should not be negative, and be enforced as such. … There may perhaps be cases where the positive and the negative are inextricably intertwined, and these cases may give rise to different considerations. … The thing ought not depend upon whether the draftsman tends to the fragmentary or the comprehensive in his style of drafting covenants. …

---

29 Law Commission, above n 21, at [7.42], citing the Property Law and Equity Reform Committee *Report on Positive Covenants Affecting Land* (Wellington, 1985) at 64.

30 *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143 (Ch).

31 *Shepherd Homes Ltd v Sandham (No 2)* [1971] 1 WLR 1062 (Ch) at 1067.

The Memorandum of Encumbrance

[31] The encumbrancers under the Memorandum of Encumbrance were the original owners of Lot 1 DP 121257 which was the subject of the 1989 subdivision.[32] The recital shows that it was entered into as a condition of the Council consenting to the subdivision:

> i CITY REALTIES (No 6) LIMITED at Wellington and UPLAND HOLDINGS LIMITED at Auckland and LAKELAND PROPERTIES LIMITED at Invercargill as tenants in common in equal shares (hereinafter called "the Encumbrancers") are registered as proprietors of an estate in fee simple subject however to such encumbrances liens and interests as are notified by Memoranda underwritten or endorsed hereon in the land described in the First Schedule[33] hereto
>
> ii The Encumbrancers have requested THE AUCKLAND CITY COUNCIL (hereinafter called "the Council") to consent to a plan of subdivision of the land described in the First Schedule hereto
>
> iii *The Council has agreed to consent to such subdivision on the condition (inter alia) that the Encumbrancers enter into and execute these presents*.
>
> (emphasis and footnote added)

[32] Under the Memorandum of Encumbrance Lot 4 of DP 126975 was encumbered with a rentcharge payable on demand and the encumbrancers covenanted not to use Lot 4 or allow it to be used other than for car parking and access for Lots 2 and 3:

> NOW THIS MEMORANDUM WITNESSETH that: –
>
> 1. The Encumbrancers hereby encumber all the land described in the Second Schedule hereto 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: –
>
> *That except with the prior consent of the Council the Encumbrancers shall not permit or cause the land described in the Second Schedule hereto to be used for any purpose other than carparking or access for the benefit of Lots 2 and 3 Deposited Plan*.

---

32 City Realties (No 6) Ltd, Upland Holdings Ltd and Lakeland Properties Ltd.

33 The land referred to in the First Schedule was Lots 1 and 2 of DP 121257.

(emphasis added)

The Deed of Covenant

[33] The Deed of Covenant was dated 14 August 1989. The covenantor was identified as the registered proprietor of Lot 2 and one undivided half share of Lot 4.[34] The covenantees were the original owners of Lot 3 and the other undivided share of Lot 4.[35] The recital recorded that:

> C. The Covenantor and the Covenantee wish to register certain land covenants pursuant to s 126(a) of the Property Law Act 1952 *for the good management of the whole of the said Lot 4 deposited plan 126975 ("Lot 4") and all improvements from time to time erected thereon ("the Carpark") and the Covenantors share of Lot 4*.
>
> (emphasis added)

[34] The respective covenants were prefaced by the following:

> THE COVENANTOR BEING THE REGISTERED PROPRIETOR OF LOT 2/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 …

and:

> THE COVENANTEE BEING THE REGISTERED PROPRIETOR OF LOT 3 HEREBY COVENANTS TO THE INTENT THAT LOT 3 SHALL BE FOREVER SUBJECT TO THESE COVENANTS AND THESE COVENANTS SHALL BE FOREVER APPURTENANT TO LOT 2 AND THE COVENANTOR'S SHARE OF LOT 4 AS FOLLOWS …

and:

> 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 …

[35] The owners of Lots 2 and 3 covenanted, among other things, to meet all the expenses and outgoings connected with the car park. Their covenants were identical

---

[34] City Realties (No 6) Ltd.

[35] Lakeland Properties Ltd and Upland Holdings Ltd.

save that their respective share of those expenses was different; each covenanted to pay their share (24/39 in the case of Lot 2 and 15/39 in the case of Lot 3) 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 …

[36] The particular costs and expenses identified under each covenant included rates payable by the registered proprietors of Lot 4, charges relating to water, sewerage and drainage by any authority, insurance premiums, the cost of operating, maintaining, inspecting, testing and repairing all services including ventilation, fire protection, emergency and other services, all charges for lighting, power, heating and ventilation, cleaning costs, security costs, painting, repair and maintenance work to the exterior and roof of the carpark, repairs and maintenance work to chattels, fixtures, fittings, fencing, curbing, channelling, drainage and other services, repairs and maintenance to electrical work and structural repairs and maintenance.

[37] In cl 3 the owners of Lot 4 covenanted that:

> 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 as "B" "C" "D" and "E" being "Carpark 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.

[38] In subsequent clauses the registered proprietors of Lot 4 promised that they would insure all improvements erected on the car park for their full insurable reinstatement value, would maintain and repair the car park, pay the charges, levies, rates and other outgoings in respect of the car park and, in the event of any of the improvements on Lot 4 being damaged or destroyed, would make good that damage

or destruction at their own costs. Interestingly the obligation to make good damage or destruction is not limited to the insurance moneys payable.

[39] There was a map attached to the Deed of Covenant described as a "plan of carparking building on Lot 4 DP126975". The legend on the side of the map recorded:

> "A" Carparks for Lot 2
>
> "B" "C" "D" "E" Carparks for Lot 3
>
> "F" "G" Carpark access
>
> (Lot numbers refer to DP121257.1)

[40] The plan itself showed the outline of the building at level 1 (basement parking area) and level 2 (upper parking deck). On each level numbers A–G were shown, corresponding with the legend. Arrows from the outside of the outline into the basement parking area were described as "entry and exit to basement". Counsel advised that those arrows correspond to actual formed driveways.

The meaning of the land covenant

[41] We agree with Mr Herbert that the covenant is to be interpreted in the context of the original joint ownership of Lot 4 by the respective owners of Lots 2 and 3. That factual situation, evident from the titles, is important. We do not, however, agree with Mr Herbert's further argument that the covenant never conferred a legal right on the owners of Lots 2 and 3 to access and use Lot 4.

[42] Mr Herbert argued that, although the owners of Lots 2 and 3 could access and use Lot 4, they could only do so by virtue of their ownership of Lot 4; there was no legal right to do so, nor any need for a legal right because it was expected that the owners of Lots 2 and 3 would continue to own Lot 4 (the relevant resource consent did not permit the de-amalgamation of the titles). It was only when the title to Lot 2 was uncoupled from the one half share in Lot 4 that it became apparent that the owners of Lots 2 and 3 might have needed (and did not have) a legal right to access Lot 4.

[43] Mr Herbert submitted that, in these circumstances, the covenant is properly interpreted as simply providing a means of regulating the use of the building as between the owners of Lots 2 and 3 in their capacity as joint owners of Lot 4 through each bearing a proportionate share of the costs and allocating specific car parks to each. He focused on the statement in the recital recording that the parties wished to register the covenants "for the good management of the whole of the said Lot 4", arguing that this indicated the limited purpose for which the covenant was entered into, rather than the creation of rights.

[44] This argument fails to recognise the purpose and effect of the Memorandum of Encumbrance. It is clear from the face of that instrument that the Council required the covenant as a condition of the subdivision. There is no basis on which to infer that the Council had any interest in how the owners of Lots 2 and 3 regulated their relationship. It is, however, reasonable to infer that, in approving the subdivision of an inner-city site, the Council had an interest in ensuring that there would be adequate car parking for the development. A covenant in gross secured by a memorandum of encumbrance was the recognised method for achieving such an objective.

[45] With that in mind we turn to consider the wording of the covenant. It was common ground that cl 3, under which the owners of Lot 4 agreed not to allow any person other than the owners of Lots 2 and 3 to use the car park, is couched in negative language. Mr Kohler suggested that this was explicable by the drafters either not realising that a positive covenant could have been used or still clinging to drafting habits that pre-dated the 1987 change in the law that permitted the notification on the register of positive covenants. We cannot speculate about the drafter's appreciation of the change, though one might assume that that an experienced drafter would be aware of the relevant legal position. In our view the more likely, and straightforward, explanation for the negative wording is that it reflected the wording of the Memorandum of Encumbrance which specified the covenant required by the Council.

[46] We are, however, satisfied that the substance of the covenant was a positive one, notwithstanding the negative wording. First, whilst the literal meaning of the

language used in cl 3 is negative, the natural and ordinary meaning of it is positive. In ordinary language, to say that "no one other than X may use the car park" will always be understood as meaning that "only X may use the car park". Excluding all but one identified person from using the car park is simply another way of saying that the identified person can use it.

[47] Secondly, cl 3 is not to be read in isolation from the other covenants made by the Lot 4 owners, particularly the various positive obligations imposed on them to meet substantial costs in connection with maintaining the car park and to repair damage to it. Whilst the owners of Lot 2 are liable to pay their respective share of the costs of maintaining and operating the car park, the owners of Lot 4 must undertake the necessary work to keep the car park in good repair and condition (cl 5), pursue the recovery of repair costs against third parties unlawfully using and damaging the car park (cl 7), and make good any damage or destruction from "fire earthquake or from any cause whatsoever" with the cost of doing so "borne by the registered proprietor(s) from time to time of Lot 4" (cl 8).

[48] Whether the covenant requires the covenantor to incur expenditure has been regarded as a relevant consideration in determining whether the covenant was, in substance, positive or negative. In *Haywood v The Brunswick Permanent Benefit Building Society*, in which the issue was whether a covenant to repair should be enforced against a mortgagee in possession on the basis that it taken title, Lindley LJ, referring to *Tulk v Moxhay* and *Wilson v Hart*[36] as showing that only a restrictive covenant will be enforced, said:[37]

> But I think that the result of these cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice.

[49] As noted above, positive covenants can now be enforced against successors in title. Nevertheless, this statement indicates that if expenditure is required that fact tells in favour of the covenant being a positive one. This line of authority has been cited more recently in *Ceda Drycleaners Ltd v Doonan*.[38] Potter J observed that,

---

36 *Wilson v Hart* (1866) LR 1 Ch App 463 (CA).
37 *Haywood v The Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403 (CA) at 410.
38 *Ceda Drycleaners Ltd v Doonan* [1998] 1 NZLR 224 (HC).

"[i]f the expenditure of money is necessary in order to comply with the covenant, then it will usually be positive".[39]

[50] Thirdly, the Deed has no commercial purpose unless the covenants as a whole are interpreted as imposing positive obligations; there is no commercial purpose in the owners of Lot 4 incurring obligations to keep the building in good repair and make good damage to it if they do not have to allow it to be used. There is no commercial purpose in the owners of Lots 2 and 3 agreeing to meet the costs associated with the car park if they do not receive any rights to use it. The only way these covenants could have any commercial meaning would be if the owners of Lots 2 and 3 actually got what they were paying for – access to and use of the car park.

[51] Fourthly, although the Memorandum of Encumbrance did not purport to confer any positive rights on the owners of Lots 2 and 3, it clearly contemplated that such rights would be conferred. The use of "benefit" in cl 2 makes this clear. The only conceivable benefit that could have been conferred was the right to use the car park on Lot 4. If the owners of Lot 4 were to refuse the owners of Lots 2 and 3 the right to use the car park there would be no benefit conferred, only a burden. If that were to happen the owners of Lot 4 would be in breach of the covenant contained in the Memorandum of Encumbrance.

[52] For these reasons we are satisfied that the purpose of the covenant was to confer on the owners of Lots 2 and 3 the right to use Lot 4 for parking and, when read in its entirety in light of that purpose, the substance of the promises made in the covenant was to confer the right on the owners of Lots 2 and 3 to use the car park on Lot 4. It is implicit that this right carries with it the right to use the access-ways in and out of the car park.

---

[39] At 235.

Result

[53] The appeal is allowed. The judgment in the High Court is set aside. There will be declarations that:

(a) The Land Covenant confers on the registered proprietors of Lot 2 the exclusive right to use the area shown as "A" on the map attached to the Memorandum of Land Covenants for the purpose of car parking.

(b) The Land Covenant confers the right on the appellants to use the right of way shown as "F" and "G" on the map attached to the Memorandum of Land Covenants to access the area shown as "A" on the same map.

[54] The appellants also sought injunctive relief. This is unnecessary given the terms of the declarations above.

[55] The second and third respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements. They sought an uplift of 50 percent to recognise the unsatisfactory history of the matter but there is no basis on which to make such an order. The appellants claimed indemnity costs in the High Court on the causes of action on which they obtained judgment by consent. This appeal, however, relates to causes of action on which the respondents prevailed and there is nothing arising from those aspects that would justify an uplift.

[56] Finally, given the outcome of the appeal, costs on the High Court proceedings should be reconsidered by that Court.

Solicitors:
Legal Vision, Auckland for First to Eleventh Appellants
Goodwin Leal, Auckland for Second and Third Respondents