IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA702/2018
CA25/2019
[2019] NZCA 147

BETWEEN	NEW ZEALAND INDUSTRIAL PARK LIMITED First Appellant
	YE QING Second Appellant
AND	STONEHILL TRUSTEE LIMITED Respondent

Hearing:	1 April 2019
Court:	Gilbert, Wylie and Thomas JJ
Counsel:	D T Broadmore and H C M S Snell for Appellants S L Robertson QC for Respondent
Judgment:	9 May 2019 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal in CA702/2018 is allowed.

B The order made in the High Court is set aside. The covenants D284105.4 and D541257.6 are to be reinstated so they continue to apply to the estate in fee simple Lot 1 Deposited Plan 463893 as comprised in Certificate of Title Identifier 614849.

C The appeal in CA25/2019 is dismissed.

D The cross-appeal in CA25/2019 is dismissed.

E The respondent must pay the appellants reasonable costs in CA702/2018 on an indemnity basis.

F We make no separate order for costs in CA25/2019.

REASONS OF THE COURT

(Given by Wylie J)

Table of Contents

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The appellants, New Zealand Industrial Park Limited (NZIPL) and Ye Qing (Mr Ye), appeal two judgments given by Woolford J in the High Court at Hamilton. The first judgment ordered that two restrictive land covenants (the covenants) benefitting land now owned by NZIPL be modified, so that they no longer apply to land owned by the respondent, Stonehill Trustee Limited (STL).[1] The second judgment declined to award compensation to NZIPL consequent on the modification of the covenants. The Judge also ordered STL to pay NZIPL's reasonable costs on an indemnity basis.[2]

[2] STL has filed a cross-appeal. It challenges the award of indemnity costs to NZIPL.

Factual background

Overview

[3] On 2 May 2018, Mr Ye entered into an agreement to purchase 84.5 hectares of land near Pokeno from the then owner — Havelock Bluff Ltd. The land had the benefit of two covenants — one created by deed in April 1998, number D284105.4, and the other by deed dated 14 September 2000, number D541257.6.

[4] The agreement for sale and purchase settled on 1 October 2018, and Mr Ye became the owner of the land. We were told from the bar that, on 20 November 2018, shortly after the first judgment, Mr Ye transferred the land to NZIPL. He is the sole director of that company and it is clear from the affidavits filed that it was always Mr Ye's intention to transfer the land to the company. For simplicity we will refer to the appellants as NZIPL.

---

1 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 2938 [HC Judgment 1].
2 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 3436 [HC Judgment 2].

[5] When the covenants were created, the land now owned by NZIPL, together with other adjoining land, was owned by Winstone Aggregates Ltd (Winstone). The land was zoned for aggregate extraction and processing, and Winstone entered into the covenants with the then owners of two adjoining properties, to help protect the operation of any quarry it might establish from complaints from neighbours.

[6] We discuss the covenants in more detail below. Broadly, both provide that the servient land is only to be used for the purposes of grazing, lifestyle farming and/or forestry, and they preclude the owner for the time being of the servient land from complaining about any adverse effects which might arise from quarrying on the dominant land.

[7] Winstone applied for, and finally obtained, consent for a quarry in 2002.[3] It did not however take advantage of the consent and it expired in 2009. Winstone then sold off the dominant land in different parcels, and part of it has ended up in NZIPL's ownership.

[8] STL entered into an agreement to purchase its land in May 2017 and it settled the purchase on 15 August 2017. STL's land comprises some 28 hectares and it adjoins the NZIPL land. Approximately a quarter of the STL land is subject to the covenants in favour of the NZIPL land. The balance is part of the dominant land.[4] Mr Bishop, a director of STL, accepted in cross-examination that he was aware of the covenants at the time STL purchased its land, although he did qualify this by saying that he was "… probably not as aware as [he] should [have] been …".

[9] STL entered into a conditional agreement to sell its land to Synlait Milk Ltd (Synlait) in February 2018. It was a condition of the sale and purchase agreement that STL procure the removal of the covenants from its land. The agreement recorded that if STL had not procured the surrender of the covenants by settlement date, then Synlait, at its discretion, could elect to:

---

3 *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A80/02, 17 April 2002.
4 This is disputed by STL. See below at [67].

(a) enter into possession of the land without any obligation to pay interest or other monies to the vendor;

(b) cancel the agreement; or

(c) settle the agreement, without prejudice to its rights, including as to compensation.

The agreement also permitted Synlait to complete earthworks necessary to enable industrial development of the land prior to settlement, and STL gave Synlait a licence to occupy the land for this purpose.

[10] STL initially endeavoured to negotiate a surrender of the covenants with Havelock Bluff Ltd, the then owner of that part of the dominant land now owned by NZIPL. Its endeavours were unsuccessful. It also had discussions with Mr Ye when he became the owner of that part of the dominant land. Again, these discussions did not lead to agreement.

[11] On 25 May 2018, STL filed an originating application seeking orders under s 317 of the Property Law Act 2007 (the Act) extinguishing or modifying the covenants so they no longer apply to its land.

[12] In March 2018, Synlait obtained (on a non-notified basis) resource consent to undertake earthworks on the land it was buying from STL and, in May 2018, it obtained a further consent permitting it to construct and operate a dairy factory on the land.[5] It then commenced construction of the dairy factory.

[13] NZIPL's solicitors wrote to STL's solicitors on 19 June 2018 demanding that STL require that all works in breach of the covenants cease and advising that NZIPL would be opposing STL's originating application. STL did not respond.

[14] In a press statement released on 20 June 2018, Synlait stated that its initial capital investment in the dairy factory was estimated at $250 million, excluding

---

5 Both consents were issued by the Waikato District Council: LUC0375/18 and LUC0403/18.

the land, which it said had been "previously acquired". It also stated that initially the plant "will produce infant-grade ingredients while regulatory registration is obtained for infant formula base powder production".[6]

The covenants

[15] As noted, the covenants were both created by deed. The deeds were between the then owners of the servient land, Paul and Diane Cleaver, and the then owner of the dominant land, Winstone.

[16] The servient land was originally contained in two parcels of land totalling 9.74 hectares. The dominant land with the benefit of covenant D284105.4 was originally contained in 15 parcels of land, totalling 141.86 hectares. The dominant land that benefits from covenant D541257.6 was originally contained in 14 parcels of land, totalling 155.94 hectares (including the land with the benefit of covenant D284105.4).

[17] On 6 August 1998, and 14 September 2000 respectively, the covenants were noted on the titles to the servient land.[7]

[18] The first covenant, D284105.4, was entered into because Mr and Mrs Cleaver were proposing to erect a dwelling on their land, and the occupier of the Winstone land had applied for an enforcement order to stop them doing so. A settlement was negotiated and it was recorded in the deed.

[19] The deed records that Winstone, as covenantee, proposed to carry out quarrying activities on its land (referred to in the deed as the Quarry Land) which were likely to result in "noise, vibration, earth movement, dust, effects of explosion, and the usual incidents of quarrying" and that those effects could have consequences beyond the boundaries of the Winstone land. It also records that Mr and Mrs Cleaver, jointly defined as the covenantor, intended to erect a dwelling on their land (referred to in the deed as the Cleaver Land) and that the occupier of the quarry land had agreed to

---

6 Synlait Milk Ltd "Synlait confirms commissioning date of new Pokeno site" (press release, 20 June 2018).

7 It was not then possible to enter notations on the titles for the dominant land. See below at [59].

withdraw its application for an enforcement order. The deed went on to provide as follows:

> Now therefore the Covenantor for themselves, their successors in title, assigns and lessees hereby covenants and agrees with the Covenantee, its successors in title and assigns and the occupiers and operators of the Quarry Land as a positive covenant for the benefit of the registered proprietors from time to time of the Quarry Land and the occupiers and operators of the Quarry Land and any part thereof that they will henceforth and at all times hereafter observe the stipulations and restrictions contained in Schedule 3 to the end and intent that such stipulations and restrictions shall enure for the benefit of the Quarry Land and the occupiers and operators of the Quarry Land for a term of 200 years from the date of this deed, or terminating on such earlier date as quarrying operations on the Quarry Land shall cease …

Relevantly, schedule 3 provided as follows:

> 1. The Covenantor shall ensure that at all times during the term of this covenant, the Cleaver Land is used only for the purpose of grazing and/or lifestyle farming which use may include the erection of implement sheds and/or storage sheds, provided that any lifestyle farming will not interfere with the operation of the quarry on the Quarry Land. In particular but without limiting the generality of the foregoing, the Covenantor shall ensure that no additional dwelling is erected or placed on the Cleaver Land.
>
> 2. The Covenantor is aware of, and will take all reasonable and appropriate steps to advise all purchasers, lessees, licensees or tenants or any other users coming to use or having an interest in the Cleaver Land or any part thereof, of:
>
> (a) the proximity of a working quarry and other land to be developed and used as a working quarry located upon the Quarry Land; and
>
> (b) the usual incidences of quarrying including (but without limitation) noise, vibrations, earth movement, transport of materials, dust, and effect of explosion ("Quarrying") which may have consequences beyond the boundaries of the Quarry Land.
>
> 3. The Covenantor will allow the Covenantee to carry on the activities of Quarrying without interference or restraint from the Covenantor.
>
> 4. The Covenantor shall not make or bring any claim, writ, demand for damages, costs, expenses or allege any liability whatever on the part of the Covenantee and/or the Quarry occupiers or operators arising out of or caused or contributed to by the fact that the Quarry Land is or will be used by the Covenantee, and/or the occupiers or operators for Quarrying provided that Quarrying is being carried out in compliance with clause 3 (sic) of this deed.

5. The Covenantee and/or the occupiers and operators of the Quarry Land covenant with the Covenantor, that for the remaining economic life of the quarry, that quarrying on the Quarry Land will, subject to the proviso at the end of this clause, at all times be carried on in full compliance with the applicable rules of the Franklin District Council District Plan. Provided that such compliance is without prejudice to any existing use right enjoyed by the Covenantee and/or occupiers and operators of the quarry which may be inconsistent with District Plan requirements.

6. The Covenantor shall not, as part of any application for a resource consent by the Covenantee and/or the occupiers and operators of the Quarry Land related to Quarrying use, or as part of any review of or change to the applicable district plan, whether on the grounds of the effects of Quarrying on the use of the Cleaver Land or on any other grounds, make any submission seeking to apply to the Quarry Land any noise, dust and/or vibration standards or any other environmental controls, rules, or policies, which are more stringent on the Quarry Land than those which apply currently or in the future, under the district plan applicable to the Quarry Land or to the surrounding similarly zoned land.

[20] The second covenant, D541257.6, was entered into when Winstone transferred part of its land to Mr and Mrs Cleaver. The covenants are substantially similar, although the uses permitted on the servient land the subject of covenant D541257.6 are extended to allow forestry.

Zoning/subdivision

[21] Since at least 2000, most of the dominant land has been zoned for aggregate extraction and processing. That zoning is still in place over that part of the dominant land as is owned by NZIPL and quarrying is a restricted discretionary activity. Up until September 2012, the servient land was zoned rural.

[22] On 21 May 2007, the two parcels of servient land were merged together and then subdivided into two blocks, one of 8.0122 hectares, and the other of 1.728 hectares.

[23] On 26 July 2013, the 8.0122 hectare block of servient land was further subdivided into three blocks of land:

(a) A block of approximately 7.2 hectares. This block was combined with part of the dominant land and the combined block was subdivided into

two lots, one of 22.6 hectares (now owned by Stuart PC Ltd) and the other of 28 hectares, owned by STL and on-sold to Synlait. As a result, STL/Synlait now owns approximately 7.2 hectares of servient land and 20.8 hectares of dominant land.

(b) A block of 0.8 hectares. The covenant over this block was surrendered by Winstone as the then owner of the dominant land, to enable part of an adjoining road — McDonald Road — to be formed.

(c) A very small parcel of land — the balance of the initial 8.0122 block — which became part of one of the titles now owned by NZIPL.

[24] The 1.728 hectare block of servient land now forms part of a block of land comprising some 22.6 hectares owned by Stuart PC Ltd. The rest of this land is part of the dominant land with the benefit of the covenants.[8] A concrete pipe manufacturing plant now operates on this land, although not on that part of the land which is subject to the covenants.

[25] Another block of dominant land, comprising 27.4 hectares, was sold off.[9] It is now owned by Grander Investments Ltd. This block of land shares boundaries with both the STL land and the NZIPL land.

[26] In September 2012, Plan Change 24 became operative. It rezoned the servient land, together with the balance of the STL land, the Stuart PC Ltd land, and the Grander Investments Ltd land, industrial 2. It also rezoned other land at Pokeno as residential, intended to allow Pokeno to grow from a village of approximately 500 people to an urban village able to accommodate up to 5,000 people. It was common ground that following Plan Change 24, Pokeno has developed into a large residential centre. It was also common ground that Plan Change 24 did not alter the zoning of NZIPL's land. It remains zoned for aggregate extraction and processing.

---

8 See below at [67].
9 See below at [67].

[27] On 2 May 2018, Plan Change 21 — a privately initiated plan change — was approved. It rezoned a block, known as the Graham Block, from rural to residential 2. The evidence was that this plan change took into account the aggregate extraction and processing zone on NZIPL's land by putting in place a "large lot overlay". The evidence was that this is a common response where there are "interface issues". The planner called by STL, Phillip Comer, said that the large lot overlay was intended to facilitate appropriate transition and buffer zones to mitigate potential reverse sensitivity effects which might arise from any quarrying on the land zoned for aggregate extraction and quarrying.

[28] On 18 July 2018, the Waikato District Council notified its proposed new plan — Proposed Waikato District Plan 2018. It proposes to rezone the dominant land owned by NZIPL as rural. This zoning would allow extractive industry as a discretionary activity. The proposed plan does not include a specific zone for aggregate extraction. The servient land and the adjoining dominant land owned by STL is proposed to be rezoned heavy industrial.

[29] Another entity associated with Mr Ye — Havelock Village Ltd — has lodged a submission on the proposed plan. It seeks to:

(a) Rezone as residential the dominant land owned by NZIPL (as well as other adjoining land owned by Havelock Village Ltd). Such zoning would allow for a comprehensive development yielding approximately 1,025 residential lots.

(b) Retain the ability to operate a quarry on the dominant land owned by NZIPL. It is submitted that aggregate extraction should be included as a restricted discretionary activity in the proposed new residential zone so that there will be aggregate readily available for the construction of roading within the proposed new residential zone.

(c) In the alternative, and if its proposal for residential zoning is not accepted, retain the existing aggregate extraction and processing zone and not rezone the land as rural.

[30] It was common ground between the various planning experts called by the parties at the hearing below that the proposed plan was, at the time of the hearing, at a very early stage and that the weight that could be given to its provisions was negligible.[10] There was no updating evidence before us suggesting that the position has changed.

[31] It was Mr Ye's evidence that, so long as the dominant land owned by NZIPL remains zoned aggregate extraction and processing, there is a very real possibility that he and NZIPL will want to use the land for a quarry. He said that, at a minimum, a quarry on the land could be used to supply aggregate, stone and other construction material for the residential development proposed on the adjoining land owned by other entities he is involved with. He also suggested that a commercial quarry on a larger scale remains feasible.

Overlay photo

[32] We annex to this judgment a copy of an overlay photo made available by Mr Broadmore, appearing for NZIPL. It seems that the plan was prepared when Winstone made an application to quarry the dominant land and notations A to G on the left-hand side of the overlay photo and the reference to the 1998 consent can be ignored for present purposes. The overlay photo has been updated to show the relevant land holdings as they now stand. We note the following:

(a) The land owned by STL is shown coloured both yellow and dark green. The dark green area is subject to the covenants. The yellow area is not subject to the covenants. It is part of the dominant land.[11]

(b) The red rectangle on the STL land shows the approximate location of the Synlait plant that is under construction.

(c) The balance of the dominant land, with the benefit of the covenants, is outlined by the darker orange line. As noted above:

---

[10] This was clearly correct at the time. The submission period had not then closed; Resource Management Act 1991, ss 43AA, 43AAB, 43AAC, 86A and 86B.

[11] See below at [67].

(i) part of the dominant land and part of the servient land (shown with the green diagonal lines) totalling 22.6 hectares is owned by Stuart PC Ltd.[12] It has the words "Now Hynds" noted on it;

(ii) part of the dominant land — 27.4 hectares — outlined in blue — is owned by Grander Investments Ltd;[13]

(iii) the balance of the dominant land is owned by NZIPL. It has the words "Appellants' Dominant Land" noted on it.

(d) The area in grey hatching – marked "A" – on NZIPL's land is where the aggregate resource is located.

(e) We were told from the bar that the land shown as Rainbow Waters/Bowater Land is also subject to a covenant in favour of NZIPL's land restricting development to rural uses only. We were also told that this covenant was not produced at the hearing. Mr Comer accepted in cross-examination that the Rainbow Waters/Bowater Land operated as a buffer zone between the NZIPL land and adjoining land known as the Graham Block.

(f) The Graham Block is shown on the overlay photo. It is now zoned residential.

(g) A milk treatment plant has been erected adjoining McDonald Road. It is shown as being above the dark green servient land owned by STL. It has the word "Yashilli" (sic) noted on it and it is owned by Yashili New Zealand Dairy Company Ltd (Yashili). Yashili has plans to expand its factory onto the land marked "Yashill (sic) extension". The Yashili land is not subject to the covenants; nor, insofar as we are aware, is it subject to any other covenants in favour of NZIPL.

---

12 See below at [67].
13 See below at [67].

(h) Above the Yashili land is a block of land with the words "Winston Nutritional" on it. This land is not subject to the covenants either; nor, insofar as we are aware, is it subject to any other covenants in favour of NZIPL. The land is owned by Winston Nutritional Ltd and it is proposing to locate its own milk products plant on the land.

(i) The township of Pokeno is shown towards the top and on the righthand side of the photo overlay.

The High Court decisions

The first judgment

[33] The Judge, after reviewing the relevant facts, set out the statutory provisions. He noted that STL relied on s 317(1)(a), (b) and (d) of the Act, and he briefly reviewed the law applicable to those provisions.[14]

[34] The Judge concluded that the covenants should be modified for a number of reasons.

[35] First, he addressed s 317(1)(a)(i) of the Act. He considered that there had been a change, since the creation of the covenants, in the nature or extent of the use being made of both the dominant land and the servient land. In this regard he found that:[15]

(a) three substantial parcels of dominant land have been sold off and two of three, the STL and Stuart PC Ltd land, will not be used for a quarry;

(b) the Waikato Council is reviewing its District Plan. It proposes to rezone the NZIPL land as rural;

(c) one of Mr Ye's companies seeks residential zoning for the NZIPL land and other land owned by it;

---

14 HC Judgment 1, above n 1.
15 At [29]–[36].

(d) obtaining resource consent for a quarry will be significantly more difficult than it previously was;

(e) NZIPL only opposed Stonehill's originating application to keep its options open; and

(f) the use of the servient land has changed beyond recognition. It is now zoned industrial 2, and the covenants prescribe a use of the servient land which is inconsistent with its present zoning and use.

[36] Secondly, the Judge looked at s 317(1)(a)(ii) of the Act. He considered that the character of the neighbourhood had changed, finding that:[16]

(a) Pokeno is no longer a village of 500 people surrounded by dairy farms and a vineyard.

(b) The Yashili milk factory had been established and Yashili has plans to expand its factory. Winston Nutritional Ltd is planning its own milk products plant. The Judge considered that the construction of the Synlait plant is in keeping with other developments in the vicinity, none of which are restricted by any covenant designed to benefit a proposed quarry.

(c) Plan Change 21 has led to the residential zoning of a former vineyard property to the north west (the Graham Block).

[37] Thirdly, the Judge turned to s 317(1)(a)(iii) of the Act. He found that:[17]

(a) The utility of the covenants had been compromised by the rezoning of the servient land, its merger with a large parcel of the dominant land, and the subdivision into two lots of 22.6 hectares and 28 hectares

---

16 At [37]–[39].
17 At [40]–[42].

respectively. The covenants will now have virtually no effect on any application for resource consent to build a quarry.

(b) The Hynds concrete pipe manufacturing plant has been built on part of the Stuart PC Ltd land not subject to the covenants.

(c) Synlait was legally able to build its dairy factory on the rest of STL's land not affected by the covenants. This would have made the plant closer to NZIPL's property.

(d) Because the covenants only apply to approximately a quarter of the STL land and to even less of the Stuart PC Ltd land, both property owners would be able to make submissions against any application for resource consent made in respect of NZIPL's land. The covenants do not apply to the land owned by Grander Investments Ltd. Although the covenants are only 18 to 20 years old, they are now of little or no effect, and of no practical value.

[38] Fourthly, the Judge considered s 317(1)(b) of the Act. He found that:[18]

(a) the retention of 8 hectares of grazing land in the middle of an industrial 2 zone would be incongruous;

(b) the changes in zoning are such that the industrial zone now, in effect, fulfils the purpose of the covenants.

[39] Finally, the Judge considered s 317(1)(d) of the Act. He found that no substantial injury would be caused to NZIPL if the covenants were extinguished. He observed that there would be no injury of any physical kind (such as noisy traffic) and no injury of an intangible kind (such as the impairment of views, intrusion on privacy, unsightliness or alteration to the character or ambience of the neighbourhood). The Judge noted that any injury therefore had to be of an economic kind. He said that NZIPL had not disclosed the price it paid for its land and that there was no expert

[18] At [44]–[45].

evidence as to the value of NZIPL's property either with or without the benefit of the covenants.[19]

[40] The Judge concluded that STL had made out the grounds set out in s 317(1)(a)(i)–(iii), 317(1)(b) and 317(1)(d) of the Act, and that each provided a basis to modify or extinguish the covenants.[20]

[41] The Judge then turned to the exercise of the residual discretion whether or not to extinguish or modify the covenants. He repeated that the covenants were only 18 to 20 years old, and noted that they had a term of 200 years. He accepted that STL acquired its land knowing that it was subject to the covenants, and that Synlait, with STL's consent, had started to build its plant on part of the servient land in knowing breach of the covenants, and that STL had made a business decision to act unlawfully. He was nevertheless not prepared to find that STL had acted in a manner which disentitled it to relief.[21] As a result, the Judge made an order that the covenants be modified so that they no longer apply to STL's land.

[42] NZIPL requested a further hearing on compensation. The Judge expressed the preliminary view that compensation was not warranted, but he nevertheless gave the parties the opportunity to make submissions on the issue. He also invited the parties to file memoranda as to costs.

Appeal/Stay

[43] NZIPL filed a notice of appeal to this Court and sought a stay of the judgment pending determination of the appeal. This application was opposed by STL.

[44] On 20 November 2018, the Judge issued a minute declining a stay of the judgment pursuant to r 20.10 of the High Court Rules 2016. NZIPL then orally sought a stay of execution pending determination of a further application to this Court

---

19 At [46]–[47].
20 At [49].
21 At [50]–[53].

for a stay. The Judge also declined an interim stay pending determination of any further application.[22]

[45] Grander Investments Ltd then filed an application, noting that it had not been served, seeking that the various documents filed in the proceeding be served on it, seeking leave to file and serve applications in relation to the proceeding, and asking that the first judgment be stayed until determination of any application filed by it.

[46] In a further minute, the Judge directed STL to serve Grander Investments with copies of all documents filed in the proceeding. He gave Grander Investments leave to file and serve applications in relation to the proceeding. He noted that he had previously declined a stay of the judgment, but he did not otherwise respond to Grander Investment's application for a stay.[23]

The second judgment

[47] On 20 December 2018, the Judge issued a second judgment, this time on the papers. He noted that NZIPL was seeking compensation fixed on a willing buyer/willing seller basis, and that STL had submitted that no compensation should be awarded because NZIPL would not suffer any loss as a result of modification of the covenants. It was STL's case that the correct approach was to first identify if there was any actual detriment as a result of extinguishment and then to consider whether or not there were other factors of benefit or detriment that would affect what one or other would have been willing to pay in hypothetical negotiations.

[48] The Judge held that it did not matter which approach was adopted. He considered that "[w]hichever way you look at it, NZIPL will not suffer any loss because of the extinguishment of the covenants as they were of little practical value".[24] He declined to award compensation to NZIPL.

---

22 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 23 November 2018.

23 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 19 December 2018.

24 HC Judgment 2, above n 2, at [6].

[49] The Judge then noted NZIPL's application for indemnity costs, relying on r 14.6(4)(e) of the High Court Rules and on cl 7 of sch 3 in the covenants. The Judge considered that cl 7 applied, and that it was intended to cover legal costs necessary to receive the benefit of the covenants. He held that NZIPL was entitled to indemnity costs and made an order in its favour for costs reasonably incurred and reasonable in amount.

NZIPL's appeal against the first judgment

Submissions

[50] Mr Broadmore submitted that the statutory criteria set out in s 317(1) of the Act have not been established. He argued that there have been no changes since the creation of the covenants that justify their modification or removal, and that the covenants provide the same advantages and disadvantages that they have always provided. He further argued that the continuation and enforcement of the covenants does not impede the reasonable use of the servient land in a different way, or to a different extent from that which could reasonably have been foreseen, and that on the evidence, the development of an infant formula manufacturing plant on the servient land could prevent NZIPL from obtaining resource consent for, or operating, a quarry. He said that as a consequence, they were substantially injured. Further, he argued that even if the jurisdictional thresholds set out in s 317(1) of the Act can be established, the Judge should have exercised his discretion not to modify the covenants.

[51] Ms Robertson QC, for STL, noted that, when the covenants were put in place, both the servient land and the dominant land were rural in character and use. She argued that between 2000 and 2018, Pokeno has undergone a "huge make-over", and that it is now a thriving residential community, with an adjoining industrial area. She suggested that Pokeno will grow further. She argued that the covenants no longer have any practical value, and that STL can satisfy five of the statutory criteria set out in the Act. She emphasised that almost half of the dominant land has been sold off, and submitted that the appellants' primary aim, as evidenced by the submission on the proposed Waikato District Plan 2018, is to have their part of the dominant land rezoned residential. She said that keeping the aggregate extraction zone is only their fall-back position. She put it to us that obtaining resource consent for aggregate

extraction on NZIPL's land would be significantly more difficult now than it previously was, and further, that the use of the servient land has changed "beyond recognition". She also argued that the character of the neighbourhood has "changed dramatically", both as a result of residential development and because of other large-scale commercial/industrial development in the area. She submitted that the utility of the covenants has been severely compromised and that they now apply to only a small portion of STL's land. She said that STL could build the Synlait plant on the remaining part of its land, which is closer to NZIPL's land, and that STL/Synlait, as owner of the balance of the land, could make submissions against any application for resource consent that NZIPL might make, without infringing the covenants. She argued that continuation of the covenants impedes the reasonable use of the servient land, given its industrial 2 zoning, and that no injury is caused to NZIPL if the covenants are extinguished.

Analysis

The nature of restrictive covenants

[52] A covenant is a promise made by deed, as opposed to a contractual term contained in a document not amounting to a deed.[25] A restrictive covenant is a covenant "to refrain from doing something in relation to the covenantor's land which, if done, would detrimentally affect the value of the covenantee's land or the enjoyment of that land by any person occupying it".[26] It is a promise by the owner of the servient land to the owner of the dominant land that he or she will refrain from some action on or in relation to the servient land that he or she would otherwise be entitled to undertake.[27]

[53] Restrictive covenants can play a significant role in the preservation of environmental amenity. They are often found in the residential context, for example where there is a large subdivision resulting in multiple homes in close proximity. Aesthetic matters such as house design, building height, house colour, landscaping and the like can be readily controlled by restrictive covenants. Restrictive covenants can

---

25 *Re Wilsons' Settlements* [1972] NZLR 13 (SC); and *Morley v Spencer* [1994] 1 NZLR 27 (CA).
26 Property Law Act 2007, s 4.
27 Don McMorland and others *Hinde McMorland & Sim, Land Law in New Zealand* (online ed, LexisNexis) at [17.011].

also provide an important means of protecting incompatible land use, for example, by limiting the development of land where adjoining land is used for some purpose likely to create problems for adjoining land owners – for example an airport. In the era prior to comprehensive planning legislation, restrictive covenants were commonly used to shield residential development from the impact of industrial or commercial land uses.[28]

[54] Restrictive covenants retain an important role, notwithstanding the development of environmental law. Planning controls, although often prescriptive, are not generally concerned with all of the detailed matters which negotiated covenants can cover. Restrictive covenants remain a valuable and efficient means of land use control, enabling land use preferences to be targeted accurately, at minimum cost, by the persons best positioned to assess the environmental amenity they require in any given context.[29] Landowners with the benefit of a restrictive covenant can enforce the contractual rights created by the covenant directly, without worrying about the vagaries of territorial authority regulation or more general planning controls imposed under the Resource Management Act 1991.[30] Covenants are contractual promises, and damages are an available remedy in the event of breach. So is an injunction.

[55] At common law, there was no difficulty in enforcing a restrictive covenant between those who enjoyed privity of contract. Further, the common law accepted that the benefit of a covenant ran with the land, but not, unfortunately, the burden. This produced obvious difficulties and equity intervened.[31] In equity, both the benefit and burden of restrictive covenants were enforceable by or against assignees. All future owners of a servient tenant were bound, except bona fide purchasers of the legal estate without notice of the covenant. The benefit of restrictive covenants,

---

28 Kevin Gray and Susan Francis Gray *Elements of Land Law* (5th ed, Oxford University Press, Oxford, 2009) at [3.4.2].

29 At [3.4.5].

30 *Congreve v Big River Paradise Ltd* (2007) 7 NZCPR 911 (HC); *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402 (appeal dismissed); and *Big River Paradise Ltd v Congreve* [2008] NZSC 51, [2008] 2 NZLR 589 (application for leave to appeal declined). See also Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at [10.16.03].

31 McMorland, above n 27, at [17.001].

vested in the owners of dominant tenements, was a new kind of property right created by equity.[32]

[56] The law relating to the enforcement of restrictive covenants in New Zealand is complicated. Much depends on when the covenant was created. It is not necessary to lengthen this judgment by reference to that law, because the position in respect of both positive and negative covenants created on or after 1 January 1987, is now governed by statute.[33]

[57] The relevant law is set out in ss 303 to 307 of the Act. Relevantly, s 303 provides as follows:

> **303 Legal effect of covenants running with land**
>
> (1) This section applies to a restrictive covenant, and also to a positive covenant coming into operation on or after 1 January 1987 … in either case whether expressed in an instrument or implied by this Act or any other enactment in an instrument, if—
>
> (a) the covenant burdens land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land; and
>
> (b) there is no privity of estate between the covenantor and the covenantee.
>
> (2) Every covenant to which this section applies, unless a contrary intention appears, is binding in equity on—
>
> (a) every person who becomes the owner of the burdened land (whether by acquisition from the covenantor or from any of the covenantor's successors in title, and whether or not for valuable consideration, and whether by operation of law or otherwise); and
>
> (b) every person who is for the time being the occupier of the burdened land.
>
> ...

[58] The Act makes no express provision for the benefit of covenants. Rather, it provides that the rights under a covenant to which s 303 applies rank, in relation to all

---

[32] Robert Megarry, William Wade and Charles Harpum *Megarry and Wade: The Law of Real Property* (8th ed, Sweet and Maxwell, London, 2012) at [5.026].

[33] The law was changed by the Property Law Amendment Act 1986.

other unregistered interests, "as if the covenant were an equitable and not a legal interest", subject to the effect of notification of the covenant on the register under s 307.[34]

[59] When a positive covenant or a restrictive covenant comes into operation on or after the relevant date, the Registrar General of Land may enter in the register relating to the servient land, the dominant land, or both, a notification of all or any of the following:

(a) a covenant to which the section applies;

(b) an instrument purporting to affect the operation of the covenant; or

(c) a modification or revocation of the covenant.

The relevant date in relation to positive covenants is 1 January 1987, and in relation to restrictive covenants, 1 January 1953. Notification of the covenant does not confer on the covenant any greater operation than it had under the instrument creating it, but on entry, it must be regarded as an interest for the purposes of the Land Transfer Act 1952.[35]

[60] A covenant noted on the register remains an equitable interest. The effect of notification is that the covenant becomes an interest within the meaning of the Land Transfer Act, and as a result the registered proprietor holds the estate or interest subject to the covenant, and every purchaser necessarily has notice of the existence of the covenant, by a search of the register.[36]

[61] In the present case, there is no difficulty with the enforcement of the covenants. They burden the land originally owned by Mr and Mrs Cleaver. The covenants were expressly given by Mr and Mrs Cleaver for themselves and on behalf of their successors in title and assigns. They were in favour of Winstone as the then covenantee, its successors in title and assigns, and also the owners and occupiers of

---

34 McMorland, above n 27, at [17.029].
35 Property Law Act, s 305.
36 Land Transfer Act 1952, s 62; and McMorland, above n 27, at [17.014].

the quarry land, as a positive covenant for the benefit of the registered proprietors from time to time of that land or any part thereof. There was and is no privity of estate between the covenantor and the covenantee. The covenants were created after 1 January 1987.[37] They have been notified on the titles to the servient land. STL, through its director Mr Bishop, had actual knowledge of the covenants when it purchased its land. Synlait necessarily had knowledge because the covenants are noted on the title to the servient land. The covenants are binding on STL as the owner of the servient land, and on Synlait (if it is now the owner of the land or, if it is not, as the occupier of the servient land).

Modification or extinguishment

[62] A person bound by a restrictive covenant may make an application to a Court for an order under s 317 of the Act modifying or extinguishing the covenant.[38] Application can be made in a proceeding brought for that purpose, or in a proceeding brought by any person in relation to the covenant or land burdened by it.[39]

[63] STL applied by way of originating application to the High Court. It sought leave to proceed in this way pursuant to r 19.5 of the High Court Rules.

Service

[64] Section 316(3) of the Act provides as follows:

> 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.

[65] There have been difficulties with service in this case. The memorandum filed in support of the application for leave by way of originating application, recorded that, in accordance with s 316(3), STL was required to serve the Waikato District Council as well as any other persons the Court directed. It went on to state that the only land benefitting from the covenants was the land then owned by Havelock Bluff Ltd and

---

37 The date on which the Property Law Amendment Act came into force.

38 Property Law Act, s 316. Both the High Court and the District Court have concurrent jurisdiction: Property Law Act s 362(1)(b); and *Sutherland v MacAlister* (2011) 11 NZCPR 732 (HC).

39 Property Law Act, s 316(1) and (2).

asserted that it was the only entity which needed to be served. Powell J, by minute dated 7 June 2018, granted leave for the proceedings to be commenced by way of originating application and made directions for service. He directed service on Havelock Bluff Ltd.[40] In a later minute, Powell J recorded that the proceedings had been served on Havelock Bluff Ltd, as well as on NZIPL and Mr Ye, as parties to an unconditional contract for sale and purchase with Havelock Bluff Ltd.[41]

[66] Powell J did not direct service on the Waikato District Council as the relevant territorial authority. We do not know if this was attended to.

[67] Further, it now transpires that the dominant land included not only the land owned by Havelock Bluff Ltd, which was purchased by NZIPL, but also the land owned by Stuart PC Ltd and Grander Investments Ltd. This was disputed by STL. It argued that whether the benefit of the covenants still attaches to the Stuart PC Ltd land and the Grander Investments Ltd's land (and presumably to the balance of its land) depends on whether the benefit of the covenants transferred when Winstone subdivided and then sold off parts of the dominant land. We do not consider that there is anything in this argument. When land with the benefit of a covenant is subdivided, the benefit of the covenant prima facie attaches to each lot created.[42] On its proper construction, a covenant may benefit only the whole of the land in its original form, and not lots resulting from a subdivision, but the covenants at issue in this case are clear. As noted above at [19], the covenants were for the benefit of the registered proprietors from time to time of all of the quarry land or any part thereof. The words "Quarry Land" were defined by reference to various land titles set out in a schedule and the schedule includes the land now owned by STL/Synlait, Stuart PC Ltd and Grander Investments Ltd. In our view, it is clear that the dominant land is owned not only by NZIPL, but also by Stuart PC Ltd, Grander Investments Ltd and STL, and neither Stuart PC Ltd nor Grander Investments Ltd was served.

---

40 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 7 June 2018.

41 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 17 July 2018.

42 *Gallagher v Rainbow* (1994) 179 CLR 624. See also McMorland, above n 27, at [17.048].

[68] In the event:

(a) Stuart PC Ltd belatedly consented to the application. On 20 April 2018, it sent an email to STL advising its consent. We were told from the bar that this email was not made available to the Judge at the hearing and that it was only disclosed to the Judge on 22 November 2018; and

(b) Grander Investments Ltd became involved but only after the first judgment had been issued and sealed, and after the Judge had declined an application for a stay by NZIPL pending the hearing of its appeal. As noted above at [45]–[46], the Judge made orders directing that the papers be served on Grander Investments Ltd and giving it the right to file applications in regard to the same. It is not clear to us what these orders were intended to achieve. The judgment had already been issued. It was too late to recall the judgment because it had been sealed; prima facie, it would seem that the High Court was functus officio.

[69] The position was, in our view, unsatisfactory. It was STL's responsibility to ensure that service was attended to on the Waikato District Council and on all potentially affected landowners. It failed to do so. As a result, Grander Investments Ltd has been denied the opportunity to be heard. It has lost a property right, and that right may have been of value to it.

[70] Given the view we have formed in relation to the application of s 317 of the Act, we do not however need to take this issue any further.

Section 317

[71] Relevantly, s 317 of the Act provides as follows:

> (1) On an application ... for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the … covenant to which the application relates … if satisfied that—
>
> (a) the … 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 … 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 … covenant at the time of its creation; or

(c) every person entitled who is of full age and capacity—

(i) has agreed that the … 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 … covenant, wholly or in part; or

(d) the proposed modification or extinguishment will not substantially injure any person entitled; or

(e) … the covenant is contrary to public policy or to any enactment or rule of law; or

…

(2) An order under this section modifying or extinguishing the … 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.

[72] The onus of proof lies on the owner of the servient land to show that reasons exist for the orders sought, and it is not for the owner of the dominant tenement to show a need for the continuation of the covenant. The servient owner must satisfy the court that the order sought is appropriate.[43]

[73] Section 317 of the Act also applies to easements, and in that context, this Court has observed that the courts have traditionally taken a conservative approach towards the exercise of the discretion it confers.[44] The Court stated that there is good reason

---

43 *Manuka Enterprises Ltd v Eden Studios Ltd* [1995] 3 NZLR 230 (HC) at 233; *Waikauri Bay Reserve Ltd v Jamieson* HC Auckland CP1981/87, 12 February 1990; and *Rental Space Ltd v March* (1999) 4 NZ ConvC 192,873 (HC) at 192,887. See also McMorland, above n 27, at [17.038].

44 *Okey v Kingsbeer* [2017] NZCA 625, (2017) 19 NZCPR 25 at [52].

for this. Applications to modify or extinguish an easement (or covenant) generally impact adversely on existing property interests. While there has been a progressive broadening of the statutory power granted to the courts,[45] and a commensurate relaxation of the approach the courts have adopted, s 317 of the Act still cannot be used to free a servient tenement owner from an easement (or covenant) simply to improve the enjoyment of his or her property for his or her private purposes. The courts are reluctant to allow contractual property rights to be swept aside in the absence of strong reasons.

[74] Similar sentiments have been expressed in the High Court:

(a) In *Luxon v Hockey*, Hansen J held that, in exercising its discretion, the Court should take into account, inter alia, sanctity of contract and the expropriation of property rights.[46]

(b) In *AFFCO New Zealand Ltd v ANZCO Food Waitara Ltd*, Ronald Young J suggested that there are three guiding principles that have influenced the approach of the courts when considering applications to modify or extinguish a covenant:[47]

(i) the legislative provisions are not designed to enable an owner of property to get a benefit by being freed from the restrictions imposed on the property by a covenant merely because it makes it more enjoyable or convenient for his or her private purposes;

(ii) the length of time between the imposition of a covenant and the application for its modification is a relevant factor to be taken into account; and

---

45 The jurisdiction to award reasonable compensation when a covenant is modified or extinguished was introduced as from 1 January 2008: Property Law Act, s 317(2).

46 *Luxon v Hockey* (2004) 5 NZCPR 125 (HC) at [13]. See also *A H Properties Ltd v Tabley Estates Ltd* HC Hamilton CP142/92, 3 September 1993 at 36:
… property rights are very *strong* rights. They rank, in the hierarchy of rights recognised by law, just below absolute constitutional rights. In more colloquial terms, on a scale of one to ten, constitutional rights are a ten, property rights are a nine.

47 *AFFCO New Zealand Ltd v ANZCO Foods Waitara Ltd* HC Wellington CIV-2004-485-499, 23 August 2004 at [136]; and *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) (appeal allowed in part).

(iii) the court should not exercise its discretion to permit contractual obligations undertaken in the recent past from being swept aside, unless it is shown very strong grounds for doing so.

We agree with the general approach discussed in both cases, although we note that both were decided before the jurisdiction to award reasonable compensation where a covenant is modified or extinguished was introduced.

[75] Before the Court can consider the exercise of the discretion vested in it, it must first find that one or other of the jurisdictional prerequisites set out in s 317 of the Act is met. We turn to consider those relied on by STL and considered by the Judge. There is considerable overlap between the various provisions on the facts of this case.

Section 317(1)(a)

[76] Section 317(1)(a) of the Act provides that a court may modify or wholly or partly extinguish a covenant in three separate, but related, situations. The first concerns a change in the user of either the dominant or servient tenement, the second a change in the character of the neighbourhood, and the third a change in any other circumstances the court considers relevant.

[77] There are two common denominators in each of the three situations covered by the subsection — first, change, and secondly, that any change is such that the covenant "ought" to be modified or extinguished. We note as follows:

(a) The covenants were entered into for a period of 200 years, or until quarry operations ceased. The parties must have contemplated that there would be change over the likely term of the covenants.

(b) It does not follow from the fact that there has been change, that the covenants "ought" to be modified or extinguished. The word "ought" connotes duty or obligation — something that is right and

proper.[48] That extinguishment or modification may be expedient or convenient, does not mean that it "ought" to be ordered.

Section 317(1)(a)(i)

[78] The enquiry called for under s 317(1)(a)(i) of the Act is:[49]

> … whether by reason of any change of the kind mentioned, the covenant should be modified [or extinguished]. The focus is not on the fact of change, but rather on its impact from the point of view of making it appropriate to modify [or extinguish] the covenant. It is unhelpful to consider the existence of a change separately from the context as part of the composite test which the section provides.

[79] The learned authors of *Hinde, McMorland & Sim: Land Law in New Zealand* have summarised the applicable law as follows:[50]

> It is not sufficient that changes have occurred in the use of the properties affected by the easement or covenant such that the applicant would be advantaged by the order sought. The change is most likely to be relevant if it has altered the benefit or disadvantage resulting from the continuance of the easement or covenant. Though it should not be regarded as a prerequisite to making an order, the most common justification for doing so would be evidence that the relative advantages and disadvantages flowing from the easement or covenant have become totally disproportionate by reason of changes which have occurred since its creation. The basic concern is the effect of the easement or covenant if it were not to be modified or extinguished; not the effect of the order sought. A change in the use of the burdened land subject to an easement or covenant in breach of the rights of the benefited owner will not found a successful application by the burdened owner responsible for the breach.
>
> …
>
> The change of user must have occurred between the time when the easement or covenant was created and the time when the application comes before the court. Future user is not relevant, but the change which has occurred may be measured against the user contemplated when the right was granted.
>
> Where the easement or covenant is annexed to a number of benefited properties, only some of which are in issue in the application, the Court should consider the user of all the benefited properties which was contemplated by the original subdividing owner at the time the easement or covenant was created.

---

48 John Kendall *Shorter English Dictionary on Historic Principles* (6th ed, Oxford University Press, Oxford, 2007) at 2036.

49 *Jansen v Mansor* (1995) 3 NZ ConvC 192,111 (CA) at 192,115.

50 McMorland, above n 27, at [17.039].

> Where a change of user has been brought about solely at the instance of the original covenantor, the court is reluctant to order any modification or extinguishment; this reluctance is enhanced when the party for whose benefit the covenant was created is still in occupation of the adjoining land.
>
> (Citations omitted.)

[80] We have already summarised above the approach taken by the Judge to this subsection at [34]–[42].

[81] First, the Judge noted that three substantial parcels totalling approximately 69 hectares of the dominant land have been sold off, and that the STL and Stuart PC Ltd land will not now be used for quarrying.

[82] As we have noted above at [67], there are now four separate blocks of dominant land, and four separate owners – STL, Stuart PC Ltd, Grander Investments Ltd and NZIPL. The Hynds concrete pipe manufacturing plant is located on part of the Stuart PC Ltd land. The Synlait dairy factory is being built on the STL land. We agree that it is unlikely that either piece of land will be used for quarrying. We do not however consider that the fact that the dominant land has been subdivided, that parts of it have been sold off and that quarrying is unlikely on parts of it, requires modification or extinguishment of the covenants. The majority of the dominant land is owned by NZIPL and the aggregate resource is located on its land. That resource is a valuable asset. The fact that some of the dominant land is unlikely to be used for quarrying does not change the advantages flowing from the covenants from NZIPL's perspective.

[83] Section 317(1)(a)(i) of the Act focuses on change and there has been no change in the use of NZIPL's land. At the time the covenants were created, the land was either zoned or about to be zoned for aggregate extraction and processing. It was used for rural purposes, but Winstone, as the then owner of the land, contemplated that a quarry would be developed. It made applications for resource consent to that end. The position is unchanged. The dominant land owned by NZIPL is still used for rural purposes. It is still zoned for aggregate extraction and processing. Mr Ye has given evidence that he and NZIPL may seek to undertake quarrying activities on the land.

They will require resource consent to undertake quarrying, but that was always the case.

[84] As we have noted, the benefit of the covenants is enjoyed by a number of dominant properties. The Judge should have considered the use of all of the dominant properties, and not only the uses to which the STL and Stuart PC Ltd land is being put.[51] Grander Investments Ltd was not served, and the Court did not hear evidence as to its use of its land.

[85] The Judge found that the use of the servient land has changed beyond recognition, noting that it is now zoned industrial 2. He expressed the view that the covenants prescribed the use of the servient land in a manner inconsistent with its present zoning and use, noting that there is no grazing or lifestyle farming and not a sheep in sight.

[86] With respect, we consider that these comments overstate the position. Stuart PC Ltd has not sought to build on the servient land within its property. The only change in the use of the servient land is that foreshadowed by Synlait's construction of its dairy factory, and a change in use by an applicant acting in breach of a covenant cannot be used as leverage to obtain modification or extinguishment of a covenant.[52] Although Ms Robertson submitted that STL has not relied on the fact that development has occurred on its land, it seems to us that it has, in effect, done so, because it seeks to rely on the change of zoning and what it permits.

[87] The Judge took into account the Waikato District Council's review of its district plan. He noted that the proposed plan seeks to rezone NZIPL's dominant land as rural.

[88] Again, with respect, this is irrelevant. Section 317(1)(a)(i) of the Act focuses on any change or changes in the nature and use being made of the dominant land and the servient land. To ascertain whether there has been a relevant change, the points of time which require consideration are when the covenant was entered into and when

---

51 *C Hunton Ltd v Swire* [1969] NZLR 232 (SC) at 235.

52 *A H Properties Ltd v Tabley Estates Ltd*, above n 46; and *Harvey v Hurley* (2000) 9 NZCPR 427 (CA) at [25]–[28].

the application brought under s 316 of the Act comes before the court. The future use of the dominant land is not a relevant consideration.[53]

[89] In any event, the proposed plan was, at the time of the High Court hearing, at an early stage. As already noted above at [30], it was common ground that the weight that could be given to it was negligible, and the evidence was that it is likely to be some years before it comes into force.

[90] The Judge went on to note the submission made by Havelock Village Ltd. He observed that it seeks residential zoning for its land, as well as the NZIPL land. The Judge commented that it was only in the event that NZIPL's proposal for residential development was not accepted, that NZIPL opposed rural zoning and sought in the alternative, that the aggregate extraction zone remain in place.

[91] With respect to the Judge, this is irrelevant for the reasons just discussed above at [88]. Further, his observation does not fully record Havelock Village Ltd's submissions on the proposed plan. Havelock Village Ltd does seek residential zoning, but it also seeks to retain aggregate extraction as a discretionary activity within the residential zone it proposes, so that aggregate obtained from any quarry established on the dominant land owned by NZIPL can be used for roading in the proposed residential development.

[92] The Judge took into consideration the change in zoning of the servient land from rural to industrial 2. He noted that the covenants did not envisage the creation of large-scale factories, which are permitted in the industrial 2 zone.

[93] Here, the covenants prevent development regardless of zoning, and STL, as the owner of part of the servient tenement, cannot in our view, seek to circumvent the covenant and extinguish property rights, simply by arguing that the land has been rezoned. Despite the change in zoning, the covenants continue to impose much the same disadvantages to the servient land and provide much the same advantages to the dominant land. Arguably the change in zoning enhances the value of the covenants to NZIPL if it wishes to develop a quarry. If the covenants are extinguished or

---

[53] *C Hunton Ltd v Swire*, above n 51, at 234–235; and *Luxon v Hockey*, above n 46, at [14].

modified to exclude the STL land, and the Synlait dairy factory is allowed to establish, it is likely to make it more difficult to obtain resource consent for a quarry, and it could result in tighter controls being imposed in any resource consent granted. This was accepted by STL's planner, Mr Comer. He also accepted that, despite the change in zoning, NZIPL's land continues to benefit from the covenants, and that the covenants provide a higher level of protection to NZIPL than the industrial 2 zoning. He acknowledged that, if the covenants were to be removed, a range of developments could, with appropriate consent, locate on the servient land.

[94] We are not persuaded that the requirements of s 317(1)(a)(i) of the Act are met, and we do not consider that there has been a change, since the creation of the covenants, in the nature or extent of the use being made of either the dominant land or the servient land, or both, such that the covenants "ought" to be modified or extinguished, either wholly or in part. We repeat that the covenants were entered into for a period of 200 years, or until any quarrying ceases. Some changes must have been in contemplation when the covenants were created. Such changes as have occurred, in our view, are either irrelevant, were precipitated by STL, or are of insufficient weight to justify the conclusion that the covenants ought to be modified or extinguished.

Section 317(1)(a)(ii)

[95] Section 317(1)(a)(ii) of the Act focuses on any change in the character of the neighbourhood.

[96] The meaning of the word "neighbourhood" will vary with the circumstances of each case,[54] as will what constitutes a change in its character. The servient land can be part of the neighbourhood. The neighbourhood can extend, not only to any land entitled to the benefit of the covenant, but also to other land within a reasonable radius of the servient land.[55] Increased development, particularly if it increases the burden imposed by the covenant on the servient land, could be a sufficient change in

---

54 *Richardson v Manawatu Tyre Rebuilders Ltd* [1955] NZLR 541 (SC) at 543.

55 *Luxon v Hockey*, above n 46, at [22]; and *Manuka Enterprises Ltd v Eden Studios Ltd*, above n 43, at [161].

the character of the neighbourhood to get over the statutory threshold,[56] but it may not be enough to show that the neighbourhood is in transition, if it cannot also be shown that such transition would not have been contemplated by the parties when the covenant was entered into.[57]

[97] Here, the Judge focused on the significant growth experienced in and around Pokeno, on the infant formula milk factory established by Yashili, on the milk product plant proposed by Winston Nutritional Ltd, and on the Synlait dairy factory. He also referred to the residential zone put in place by Plan Change 21 over the Graham Block. He considered that all of these matters have changed the character of the neighbourhood.

[98] We agree that, on the evidence, Pokeno has undergone significant growth since the covenants were created. Residential zoning is now closer to NZIPL's land than was previously the case; Yashili has built its infant formula milk factory on the northern side of McDonald Road; Winston Nutritional Ltd proposes a milk product plant on its land. There is also the Hynds concrete pipe manufacturing plant. These changes are all changes which affect the character of the wider neighbourhood.

[99] We are not however persuaded that these changes increase the burden imposed by the covenants on the servient land in a different way or to a different extent from that which could have reasonably been contemplated, or that they require that the covenants be modified or extinguished. The covenants were entered into relatively recently — 1998 and 2000. They have a long term. Change must have been contemplated by Winstone and Mr and Mrs Cleaver. Further, the burden on the servient land has not changed. It is only the zoning, and therefore the aspirations of STL as owner, that have changed. There has been increased development on surrounding land, but that land was never subject to the covenants. The changes in the character of the neighbourhood that have occurred are likely to make it more difficult for NZIPL to obtain resource consent to operate a quarry, but the fact that the neighbourhood has changed in character, does not mean that the covenants ought to

---

56 *Rental Space Ltd v March*, above n 43, at 192,889.

57 *Richardson v Manawatu Tyre Rebuilders Ltd*, above n 54, at 543; Toomey, above n 30, at [10.20.02(1)(a)].

be modified. The owners of the land on which the changes have taken place could always have objected to any quarry and brought claims against the operator for any adverse effects arising from any quarry operations. The construction of the Synlait dairy factory on the STL servient land has greater significance for NZIPL than any of the other developments in the neighbourhood. The factory will be closer to any quarrying activity and any adverse impact from quarrying activity will be likely to have a more significant effect on the factory. The Yashili plant, the plant proposed by Winston Nutritional Ltd and the Hynds concrete pipe manufacturing plant are all further away. So is the residential development permitted by change 21, and, as noted above at [27], it is subject to an overlay intended to mitigate any reverse sensitivity effects from quarrying. As noted above at [32(e)], the Rainbow Waters/Bowater Land is subject to a covenant in favour of the NZIPL land.

[100] Again, we are not persuaded that such changes as have occurred in the character of the neighbourhood justify the conclusion that the covenants ought to be modified or extinguished.

Section 317(1)(a)(iii)

[101] Section 317(1)(a)(iii) of the Act is a catch-all provision, of wide reach. Foreshadowed changes which are almost certain to come about may be raised under this head.[58] Change to the personal circumstances of an applicant are not however relevant.[59]

[102] Here, the Judge considered that the utility of the covenants had been compromised by the rezoning of the servient land, its merger with a large parcel of the dominant land and the subdivision of two lots of 22.6 hectares and 28 hectares. He considered that the covenants can now have virtually no effect on any new application for resource consent to develop a quarry. He said that Synlait could legally build its plant on other parts of STL's land not subject to the covenants and he observed that both STL and Stuart PC Ltd could both oppose any application for

---

58 *Luxon v Hockey*, above n 46, at [28] citing *Re Associated Property Owners Application* (1965) 16 P&CR 89.

59 *Worldwide Leisure Ltd v Harland-Baker* HC Rotorua M21/91, 18 April 1991; and *Ceda Drycleaners Ltd v Doonan* [1998] 1 NZLR 224 (HC) at 249–250.

resource consent made by NZIPL and claim against the quarry operator. He stated that the covenants do not apply to Grander Investments Ltd, and he concluded that the covenants are of no practical value.

[103] We do not consider that the utility of the covenants is compromised by the rezoning of the servient land, or by its merger with dominant land and the subdivision into two lots, for the reasons we have set out above at [82]. The majority of STL and Stuart PC Ltd land, and all of the Grander Investments Ltd land, have never been subject to the burden of the covenants, and the fact that STL and others own land that does not bear the burden of the covenants, is not, of itself, a basis to modify or extinguish the covenants.

[104] Nor do we consider the Judge's observation that Synlait could have built its dairy factory on that part of the STL land which is not subject to the covenants, advances the issue. In *Luxon v Hockey*,[60] the High Court rejected an argument that the covenant there in issue should be modified because commercial activities could be carried out on adjacent properties that would have a greater effect on the dominant land. Hansen J explained as follows:

> [28] … The defendants submit that commercial activities may be carried out on properties adjacent to the plaintiffs which do not bear the burden of the covenant, and that these would have a greater effect on the plaintiffs' enjoyment of their land than activities on the defendants' property. This is, of course, speculative. Therefore, the defendants submit that the covenant will not protect the integrity of the area … The defendants' argument is initially an attractive one, but, in my view, it cannot be correct. Every group of lots which is subject to a restrictive covenant must at some point share a boundary with land which is not subject to the burden, or is not associated with the covenant. If the defendants' argument was accepted then any land subject to any restrictive covenant would be able to point to a neighbouring lot which did not bear the burden, or was not associated with the covenant as justification for its extinguishment. Restrictive covenants are worthless if they can be so easily modified or extinguished.

We agree with this reasoning and consider that it is apposite in this case.

[105] Moreover, the Judge's observation that the Synlait dairy factory could be built on other parts of STL's land may not be factually accurate. Mr Broadmore took us

---

[60] *Luxon v Hockey*, above n 46.

through various plans lodged by Synlait when it made application for its earthworks consent, and for the resource consent to build its dairy factory. Those plans suggest that the balance of the STL land, not subject to the covenants, is relatively steep. Whether in practice, Synlait could have built its dairy factory on this other land is speculation. The reality is that the dairy factory is being constructed on the servient land, rather than elsewhere on the STL land, and NZIPL benefits from the restrictions in the covenants preventing interference, restraint, objection or claims, despite part of the STL land not being burdened by the covenants. Any claim in relation to quarrying is most likely to arise from damage to Synlait's factory once it is operative, and it is almost entirely on servient land.

[106] Finally, in this regard, we do not agree with the Judge's conclusion that the covenants, although only 18 to 20 years old, are now of little or no effect, and of no practical value. We have dealt with this above at [77(a)] and [99].

Section 317(1)(b)

[107] Section 317(1)(b) of the Act permits the Court to modify or wholly or partly extinguish a covenant if it is satisfied that the continuation in force of the covenant in its existing form would impede the reasonable use of the servient land in a different way or to a different extent, from that which could reasonably have been foreseen by the original parties at the time of the covenant's creation.

[108] Most covenants will impede the use of the servient land in some way which would otherwise have been legal. Section 317(1)(b) of the Act requires that the continued existence of the covenant, at the time of application, impedes the use in a different manner or to a different extent from that which could reasonably have been foreseen.[61] It is the manner or extent of the impeding of the use which must have changed in ways not originally reasonably foreseeable. Therefore, if the manner or extent of the impeding of the user remains the same, the ground set out in s 317(1)(b) of the Act will not be made out.[62] Neither will a covenant be modified or extinguished where the applicant has purchased the servient land knowing of the covenant, and

---

61 *Harvey v Hurley*, above n 52, at [27]. See McMorland, above n 27, at [17.040].

62 *Knowles v Henderson* (1991) 1 NZ ConvC 190,704 (HC) at 190,715; and *Jansen v Mansor*, above n 49, at 192,115.

the reliance of the dominant land owner upon it, but wishes to change the use of the servient land and seeks modification or extinguishment of the covenant to achieve that end.[63] Where it is the applicant's intention or circumstances alone that have changed since the covenant was entered into, the ground set out in the subsection will not be met.[64]

[109] The Judge found that, at the time of creation of the covenants, the original parties only foresaw the use of the servient land as grazing or lifestyle farming, and that although the impediment remains the same, the extent of the impediment is now different. He considered that the covenants were thought to be necessary at the time, to ensure that rural activities on the servient land would enable aggregate extraction activities to be undertaken on the dominant land, in a way that minimised the risk of reverse sensitivity effects. He said that since 2000, the planning framework has changed significantly, and that Plan Change 24 created the industrial 2 zone as a buffer between the land zoned aggregate extraction and the residential land. It was his view that the industrial zone in effect now fulfils the purpose of the covenants.

[110] We agree that the impediment to the reasonable use of the servient land has not changed. Since the covenants were entered into, they have prevented development on the servient land, regardless of its zoning. The restrictions were contemplated from the outset, and they are now no different from those which were foreseen when the covenants were entered into. The covenants are notified against the titles to the servient land, and arguably any use which is inimical to the covenants cannot be considered a reasonable use of the land.[65] The covenants were and remain more restrictive than the zoning, and they continue to provide a higher level of protection to the dominant land than the zoning alone. We repeat that the term of the covenants is such that restriction on future use must have been foreseeable. STL purchased its land with knowledge of the covenants. It knew or ought to have known that NZIPL relied on them — particularly if it wanted to quarry its land. Mr Ye refused to agree to their discharge. He said in evidence that he wants to quarry the NZIPL land and he did not resile from this when cross-examined. It is simply that STL wishes to change the use

---

63 *A H Properties Ltd v Tabley Estates Ltd*, above n 46.
64 *Luxon v Hockey*, above n 46, at [30].
65 *Harvey v Hurley*, above n 52, at [26]. We note that the Court was there dealing with a registered easement, and not a covenant which is simply notified on the title to the relevant land.

of its servient land and it seeks to modify or extinguish the covenants to achieve that end. There is nothing to suggest that the reasonable use of the servient land is impeded in a different way or to a different extent, from that which could reasonably have been foreseen when the covenants were entered into.[66]

Section 317(1)(d)

[111] Section 317(1)(d) of the Act permits the court to modify or extinguish, wholly or in part, a covenant if it is satisfied that the proposed modification or extinguishment will not substantially injure any person entitled.

[112] This ground has been described as a "long stop against vexatious objections to extended user".[67] The first issue is whether the proposed modification or extinguishment would cause injury to the dominant land owner. The second issue is the extent of any injury. The subsection requires that the dominant land owner not be substantially injured, thereby contemplating that there may be injury that is less than substantial. The word "substantially" has been held to mean "real, considerable, significant, as against insignificant, unreal or trifling".[68]

[113] The Judge took the view that NZIPL would not be substantially injured if the covenants were extinguished. He considered that there would be no injury of a physical kind and no injury of any intangible kind. Any injury would therefore have to be of the economic kind, and that there was no evidence presented by NZIPL of the value of its property with or without the benefit of the covenants. He repeated his view that a dairy factory could be built closer to NZIPL's boundary, that the covenants have no practical value, and that they would have no effect on the Waikato District Council's decision on any application for resource consent to develop a quarry. The Judge disagreed with Mr Ye's assertion that it would become more difficult to obtain resource consent to develop a quarry if the covenants were extinguished or modified. He concluded that no injury had been demonstrated.

---

66 See *Jansen v Mansor*, above n 49, at 192,115.
67 *Ridley v Taylor* [1965] 2 All ER 51 (CA) at 58. See also McMorland, above n 27, at [17.042].
68 *Plato v Ashton* (1984) 2 NZCPR 191 (CA) at 194.

[114] Aggregate extraction on NZIPL's land is a restricted discretionary activity. As such, any application for resource consent will fall to be determined by reference to s 104C of the Resource Management Act. The consent authority can have regard only to those matters in respect of which its discretion is restricted, either in national environmental standards or other regulations, or in its plan or proposed plan. The local authority could grant or refuse the application. Conditions could be imposed, but only in respect of these matters in respect of which the discretion has been restricted. Any quarry will also require an air discharge consent or consents from the Waikato Regional Council.

[115] There was unchallenged evidence before the Judge that any dairy factory will be sensitive to contaminants, including dust. There was evidence that the existence of the dairy factory could significantly affect the conditions that might be imposed on any resource consent for a quarry and might affect the grant of any consent for quarrying. If the covenants are extinguished, Synlait will be able to object to the grant of any resource consent. While STL's planning expert, Mr Comer, stated in his evidence-in-chief that the covenants would not make it more difficult to obtain resource consents for a quarry, and that there was no reason for the covenants now that the servient land is zoned industrial 2, in cross-examination he conceded that the existence of a dairy factory on the STL land:

(a) could make it more difficult to obtain local authority resource consents for a quarry, if a submission is made against the quarry, and the Council considered that the points made in the submission were relevant and carried weight;

(b) could, along with other factors, mean that there are tighter controls in any resource consent granted for a quarry;

(c) could be one reason why the local authority might determine not to grant resource consent for a quarry;

(d) could make it more difficult to obtain regional Council air discharge consents for a quarry, or result in tighter controls on air discharge consents granted.

[116] As already noted, Mr Comer also accepted that NZIPL's land continues to benefit from the covenants, and that the covenants provide a higher level of protection than the industrial 2 zoning.

[117] Similarly, STL's other planning expert — Mr Scrafton — acknowledged that it would be easier to obtain resource consent for and operate a quarry if the dairy factory did not exist. He qualified this by saying that he did not know enough about the sensitivity of a dairy factory to suggest that its existence would be a "silver bullet" preventing resource consent for a quarry. He accepted that the existence of a dairy factory could be one of many potentially sensitive receivers that might impede the development of any quarry.

[118] We agree with Mr Broadmore that if the covenants are modified or extinguished, allowing development of the Synlait dairy factory, NZIPL could well suffer injury of an intangible kind, that is more than insignificant or trifling, when and if they want to establish and operate a quarry. NZIPL would lose the protection that it currently enjoys from objection to any resource consent application it might make for a quarry on its land. It would lose the protection against interference, restraint, objection or claim in relation to the operation of the quarry it might establish. There could be increased costs in operating any quarry. The Council might require that any quarry be reduced in scale to prevent adverse effects. There is the possibility that NZIPL might not be able to obtain the necessary resource consents for a quarry at all, and there is a likelihood that there would be additional and more onerous conditions on any resource consents obtained.

[119] In our judgment, the Judge was wrong to conclude that the extinguishment or modification of the covenants, so as to permit operation of the Synlait dairy factory, will not substantially injure NZIPL, and valuation evidence was not required to establish that it sustained injury.

Summary

[120] For the reasons we have set out, we consider that the jurisdictional thresholds for the making of an order extinguishing or modifying the covenants as set out in s 317(1)(a)(i)–(iii), (1)(b) and (1)(d) of the Act were not established. Accordingly, we allow the appeal in CA702/2018.

[121] Given this conclusion, it is not necessary for us to go on to consider whether or not the discretion conferred by s 317(1) of the Act was properly exercised by the Judge.

NZIPL's appeal against the second judgment

[122] Given our conclusion in relation to NZIPL's appeal against the first judgment of 13 November 2018, it is not necessary for us to consider NZIPL's appeal against the Judge's second judgment of 20 December 2018. If the covenants remain in place, NZIPL cannot be entitled to any compensation for their modification or extinguishment. Accordingly, we dismiss the appeal in CA25/2019.

STL's cross-appeal against the second judgment

[123] As noted, the Judge ordered indemnity costs in favour of NZIPL, provided that the costs were reasonably incurred and reasonable in amount. He held that cl 7 of both covenants applied, and that it was intended to cover legal costs necessary to receive the benefit of the covenants.

Submissions

[124] Ms Robertson argued that there is no entitlement to indemnity costs. She submitted that any entitlement said to arise from a contract or deed must be "plainly and unambiguously expressed",[69] and that the Judge erred when he awarded indemnity costs to NZIPL by reference to cl 7 contained in the covenants. She argued the clause provides a contractual entitlement to indemnity costs in relation to the enforcement of the deeds, and that the clause does not oblige the covenantor to pay

[69] *Newfoundworld Site 2 (Hotel) Ltd v Air New Zealand Ltd* [2018] NZCA 261 at [84].

the covenantee's costs, where the covenantee was unsuccessful. She argued that any liability for costs falls to be decided according to usual costs principles.

[125] Mr Broadmore responded by submitting that STL by bringing its application, was seeking an indulgence from the Court, and that in any event, NZIPL were entitled to indemnity costs under cl 7 to the covenants. He argued that NZIPL's claim for indemnity costs fell squarely within that clause because STL was challenging the existence or validity of the covenants.

Analysis

[126] Clause 7 in both covenants provides as follows:

> The Covenantor shall pay its solicitors' legal costs and disbursements directly or indirectly attributable to the perusal, execution and registration of this deed and its covenants together with the Covenantee's and/or the quarry occupiers and operators' solicitors' legal costs and disbursements directly or indirectly attributable to the enforcement of this deed and its covenants.

[127] Enforcement means to compel observance,[70] and in our judgment, and in the circumstances of this case, the clause does require STL to pay NZIPL's costs on an indemnity basis.

[128] The obligation to pay costs created by cl 7 in the covenants extends to costs and disbursements indirectly attributable to the enforcement of the deed and its covenants. Here, STL endeavoured to negotiate the surrender of the covenants. It was unsuccessful in that regard. STL then permitted Synlait to begin construction in breach of the covenants, and in May 2018, it filed its originating application seeking to modify or extinguish the covenants. In June 2018, NZIPL wrote to STL protesting the breach, demanding that it cease, and saying that the originating application would be opposed. There can be no doubt that the application by STL was in response to the unsuccessful negotiations — in effect, NZIPL had intimated that it would not surrender the covenants and implicitly, that it would seek to enforce them. NZIPL's actions in resisting the application for modification or extinguishment were, in effect, indirectly

---

[70] *400 Lonsdale Nominees Pty Ltd v Southern Cross Airlines (in liq)* (1993) 10 ACSR 739 (VSC) at 746.

seeking to enforce the covenants, by preventing them from being modified or extinguished.

[129] We note that under s 316(2) of the Act, an application under s 317 by a person bound by a restrictive covenant can be made in any proceeding relating to its enforcement. This recognises the reality that enforcement of a covenant and an application to extinguish or modify it will often be combined.

[130] Accordingly, we uphold the second judgment in this regard and dismiss the cross-appeal by STL.

Result

[131] The appeal in CA702/2018 is allowed.

[132] The order made in the High Court is set aside. The covenants D284105.4 and D541257.6 are to be reinstated so they continue to apply to the estate in fee simple Lot 1 Deposited Plan 463893 as comprised in Certificate of Title Identifier 614849.

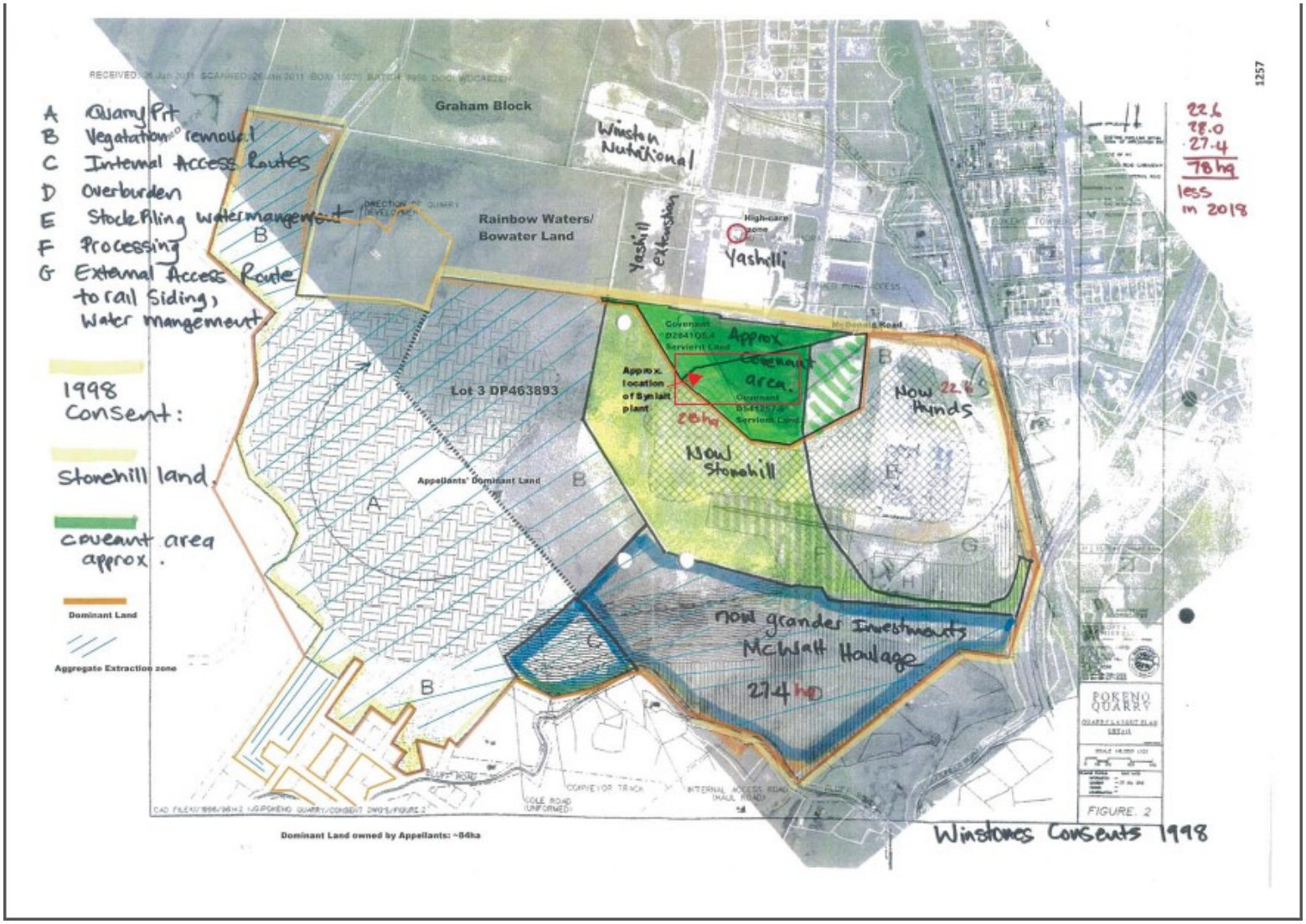
[133] The appeal in CA25/2019 is dismissed.

[134] The cross-appeal in CA25/2019 is dismissed.

[135] The respondent must pay the appellants reasonable costs in CA702/2018 on an indemnity basis.

[136] We make no separate order for costs in CA25/2019.

Solicitors:
Buddle Findlay, Auckland for Appellants
Bay Law Office, Auckland for Respondent


A Quarry Pit
B Vegatation removal
C Internal Access Routes
D Overburden
E Stockpiling watermangement
F Processing
G External Access Route to rail Siding, Water mangement
1998 Consent:
Stonehill land.
covenant area approx.
Dominant Land
Aggregate Extraction zone
Graham Block
Winston Nutritional
Rainbow Waters/ Bowater Land
Yashili
Yashili Extension
High-care zone
Lot 3 DP463893
Approx. location of Synlait plant
Approx Covenant area.
Now Hynds
Now Stonehill
Appellants' Dominant Land
now granders Investments McWatt Haulage
27.4 ha
Dominant Land owned by Appellants: ~84ha
FIGURE. 2
POKENO QUARRY
22.6
28.0
27.4
78 ha
less in 2018
1257
Winstones Consents 1998