

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CIV-2021-009-000715
[2021] NZDC 11580**

BETWEEN	GOULD DEVELOPMENTS LIMITED Plaintiff
AND	MARK ADRIAN BEARDSLEY Defendant

Hearing: 15 June 2021

Appearances: G K Riach for the Plaintiff
No appearance for or by the Defendant

Judgment: 16 June 2021

**REASONS JUDGMENT OF JUDGE P R KELLAR
[on modifying land covenants]**

[1] This is an application for orders under s 316 and s 317 of the Property Law Act 2007 modifying land covenants.

[2] The purpose of the application is to add a covenant to a set of restrictive covenants which bind owners of land in an area just south of Rolleston township.

[3] The covenants were originally introduced during a semi-rural subdivision of land pursuant to a deposited plan (DP 70352). The subdivided lots were four-hectare blocks intended to be occupied as lifestyle semi-rural properties. The restrictive covenants reflected the semi-rural nature of the area which, at the time, was the objective of the applicable Selwyn District Council District Plan. Accordingly, the covenants dealt with things such as animal husbandry, commercial or industrial use and a prohibition on erecting or placing on the land any dwellinghouse other than a single dwelling of a certain size.

[4] Since the introduction of the covenants in 1995, the use of the land has changed in character in keeping with a new Operative District Plan which now encourages residential subdivision of rural and semi-rural land near to Rolleston township as that town has grown and continues to grow.

[5] In 2018, a landowner applied to the District Court for modification of the covenants. The consequent court order removed the prohibition against additional housing, thereby permitting housing infill into the previously semi-rural blocks.

[6] Subdivision and development has continued apace with many of the original lots now being subdivided and with new roading networks established as part of the developments. Until recently, this was able to occur, notwithstanding the restrictive covenants. The requirement of all resource consents that roads must vest in the local authority was able to be achieved by way of a dedication process. Under that process, the land was able to be transferred to the local authority and then dedicated as road without the title being cleared of encumbrances such as covenants and easements. Recently, however, the Registrar General of Land has changed that policy by requiring roads to be vested in the local authority in the normal fashion. The new policy requires existing interests and encumbrances to be extinguished when the land becomes road and title is cancelled. The same applies to reserves.

[7] Accordingly, the consent of all affected landowners would be required for land comprising the road network in the subdivisions to vest in the local authority free of such encumbrances.

[8] As a result of prior developments, the number of owners of land affected by the covenants now amounts to some 259 different owners. The numbers and respective identities of the owners will change over time. The proposed modification to the covenant by the addition of what might be termed an “automatic sunset clause” will enable the land to vest in the local authority free of encumbrances without obtaining the consent of all affected landowners. However, it only applies to land that will be road or reserve and, therefore, the interests of landowners are not prejudiced. The restrictions that are the subject of the covenants will not ever be activities that occur on land which has become road or reserve.

[9] Section 317 of the Property Law Act 2007 provides:

317 Court may modify or extinguish easement or covenant

- (1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the easement or covenant) if satisfied that—
 - (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
 - (i) the nature or extent of the use being made of the benefited land, the burdened land, or both;
 - (ii) the character of the neighbourhood;
 - (iii) any other circumstance the court considers relevant; or
 - (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
 - (c) every person entitled who is of full age and capacity—
 - (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or
 - (ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or
 - (d) the proposed modification or extinguishment will not substantially injure any person entitled; or
 - (e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or
 - (f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.
- (2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[10] In *Synlait Milk Limited v New Zealand Industrial Park Limited* the Supreme Court wrote:¹

The cases on s 317 generally adopt a two-stage approach. The Court's first task is to determine whether one (or more) of the grounds in s 317(1) are made out. If one (or more) of the grounds is made out, the second task is to determine whether the discretion to extinguish or modify the covenant should be exercised.

[11] In terms of s 317(1) of the Property Law Act I am satisfied that in the time since creation of the covenants there has been a change in the nature and extent of the use being made of both the benefited and burdened land and the character of the neighbourhood. Of the original 16 lots on the Deposited Plan, all but three have either been subdivided or are in the process of being subdivided. The changes are in keeping with the Selwyn District Council's new operative District Plan which encourages development.

[12] Further, the continuation in force of the covenant without the modification would impede the reasonable use of the burdened land in a different way or to a different extent to that which could reasonably have been foreseen by the parties to the covenant. The subdivision of land into smaller residential lots was not a permitted land use for the area in 1995. Now that it is not only permitted but encouraged by the local authority, the inability for roads to vest without all landowners' consent would impede the reasonable use of the land. Further, the change in the Registrar General of Land's policy as to the process by which such roads are vested in the local authority could not have been reasonably foreseen.

[13] The Registrar General of Land has confirmed that the proposed covenant will be accepted and will be effective in enabling the land to vest as road or reserve free from the burden of the covenant without consent of the benefiting landowners.

[14] Further, the applicant would suffer significant loss if the modification is not allowed. That would include the loss of value of the properties which were purchased

¹ *Synlait Milk Limited v New Zealand Industrial Park Limited* [2020] NZSC 157 at [67].

in the reasonably held belief that subdivision was possible. The loss would also be incurred in respect of significant numbers of agreements for sale and purchase already entered into by the applicant with purchasers of residential lots.

[15] This Court made an order directing service of the application. Service has been effected in terms of the directions as follows:

- (a) Public notice of the application was given by two separate advertisements in *The Press* newspaper on 5 May and 8 May 2021, respectively. A Certificate of Advertising has been filed.
- (b) A letter and copy of the Notice were delivered by hand to all letterboxes in the streets set out in the Notice which was exhibited to the application and subsequent order.
- (c) The Selwyn District Council, as the relevant territorial authority, has been served with the application, supporting affidavit and orders for directions as to service.

[16] Of the almost 300 owners potentially affected by the application only one has filed a Notice of Opposition. On 28 May 2021, Mark and Tracey Beardsley filed a Notice of Opposition. They are residents in one of the streets. The Notice of Opposition seeks that the applicant confine the modification to land that it owns (or is to own) rather than apply it more generally. In that circumstance, the opposers say they would withdraw their Notice of Opposition. The Notice of Opposition does not appreciate the objective and effect of the application and appears directed to resisting further development of the adjacent or nearby land. The solicitor for the applicant wrote a detailed letter to the opposers addressing the issues which they raised in the Notice of Opposition. Mr and Mrs Beardsley did not appear at the hearing in support of their opposition.

[17] It is possible for the applicant to amend its application so that modification of the covenant would relate only to its own land. That, however, would make the position regarding modification of the covenants complex in that it would be difficult

for landowners to know whether the covenant had been modified in respect of their particular parcel of land. Further, the modification which the applicant seeks relates only to land which is currently permitted to be subdivided in respect of the Operative Plan and only in respect of land that will become road or reserve. Thus, there is no prejudice to the opposers or, indeed, any other landowner. If the remaining land is never subdivided, then the matter will never become an issue as the restrictive covenants will remain in their existing form.

[18] The purpose of the proposed modification is simply to deal efficiently with the position regarding road or reserve in subdivisions that have already been either consented or could in the future be consented in respect of land which is already zoned for further residential infill subdivision.

[19] The application for orders modifying the land covenants is, therefore, granted in terms of the application dated 30 March 2021 with the following corrections:

- (a) The correct Memorandum of Transfer is A204853.22;
- (b) The word “of” in paragraph 1(a)(i) shall be inserted between the word “benefit” and the words “and forever are pertinent....”.

Judge P R Kellar
District Court Judge

Date of authentication: 16/06/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.