Crying over spilt milk? The Synlait *decision and land covenants*

INTRODUCTION

Zoning changes, but covenants are forever.

That is a pithy summary of the intersection between the Resource Management Act 1991 (RMA) and property law (more specifically, private land covenants), but it is a summary with elements of both truth and untruth. The intersection between the RMA and property law is of course a subject of considerable interest, and indications from the courts are that more attention is needed to the degree of disparity and overlap between these fields. Covenants exist independently of zoning and do not always last forever, but they run with the land, bind successors in title and can last much longer than planning provisions.

Taking this further, resource management is sometimes considered a subset of public law; conversely, we often talk of private property, but even private property has important public law aspects. Land law in New Zealand – at least as it is taught in law schools – is often seen to rest on the Land Transfer Act 2017, which rests heavily on the role of the state in guaranteeing title. While other aspects of land law (such as the Property Law Act 2007 (PLA)), common law issues of contract and tort and the more opaque topic of equity may be seen to reflect a more private law orientation, there remains a considerable degree of public law in private land law issues. In the present context, the *Synlait* decision (*Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157) contains a useful analysis of how land covenants may be modified or extinguished because of RMA-based changes, including zoning.

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The relationship between the RMA and property law deserves more attention, and this article continues a theme I developed earlier (for example, "Private Land Use Arrangements in the Environment Court: Recent Decisions" (April 2019) RMJ at 15). While *Synlait* is nominally a decision on private land covenants, it also has broader resource management implications. For that reason, this article examines PLA issues with a particular focus on commentary on zoning within the decision.

PROCEDURAL MATTERS AND BACKGROUND

This decision reflected an unusual incident of timing, of 'spilt milk', as the parties had essentially already settled. However, the Supreme Court, ostensibly conscious of the varying approaches in the High Court and Court of Appeal, of the matters of general importance, and of its progress with the judgment (at [1], [4] and [9]), proceeded to issue its decision.

While historically well-known as an ice-cream stop on the way to Auckland, Pokeno has changed immensely in the last 20 years. It is now a relatively bustling and

well-established dormitory suburb, but while I was an undergraduate, it had something of a crisis of identity and temporarily rebranded itself to jenniferann.com. Around this time, in 1998 and 2000, virtually identical covenants were entered into in favour of a 140-ha block of land which contained a basalt resource suitable for a quarry. Over time, this 140-ha block was subdivided and came to have four different owners, including New Zealand Industrial Park Ltd (NZIPL). The burdened land was a parcel of 9.74 ha, now split across three titles. Part of the burdened land had been amalgamated with the benefited land and some with other titles. Covenants run with the land and do not disappear when land is subdivided: covenants are (not quite) forever.

The 2000 covenant was in the nature of a 'reverse sensitivity' or 'no complaints' covenant: a well-known example of private land law arrangements being used to achieve resource management outcomes (see for example, A Davidson "Reverse Sensitivity — Are No-Complaints Instruments a Solution?" (2003) 7 NZJEL 203). The covenant instrument provided that the owner of the benefited land intended to carry out quarrying activities, with various noise, vibration, dust and other quarrying impacts. To protect the interests of the owner of the benefited land in a quarry, the covenantor (as owner of the burdened land) agreed, among other things, to limit its activities to planting, forestry, grazing and lifestyle farming, as long as these activities did not interfere with the operation of a quarry.

The context of change in Pokeno warrants attention. The 2008 Pokeno Structure Plan proposed an increase from around 500 people to 5,000. Plan Change 24 in 2012 gave effect to this and rezoned land to industrial, which meant the uses in the 1998 and 2000 covenants were no longer consistent with the zoning. Both Plan Change 24, and the later Plan Change 21 in 2018, also provided for further residential zoning. Summarising the changes, the Supreme Court noted that there had been zoning changes: (1) a change from the burdened land being rural and the benefited land seen as suitable for a quarry, to the land in the vicinity of Pokeno becoming residential and industrial; and (2) ownership changes, with various subdivisions and amalgamations being implemented; things were not the same as they had been.

In this context, then-owner Stonehill sought modification of the covenants under s 317 of the PLA so that they no longer applied to the burdened land owned by Synlait – effectively, a partial extinguishment of the covenants. The Supreme Court's assessment of the grounds of relief under s 317 are discussed below but in brief terms are: s 317 allows a court to modify or extinguish an easement or covenant on various grounds, including because of a change being made in the use of the land, a change in the neighbourhood or other circumstances (s 317(1)(a)); that the continuation would impede reasonable use (s 317(1)(b)) and that the modification or extinguishment will not substantially injure any party (s 317(1)(d)); alongside other grounds – such as the agreement of all parties and being contrary to public policy – that are less relevant here. The High Court found in favour of Stonehill. The Court of Appeal, on the other hand, held that none of the grounds in s 317(1) of the PLA were made out. The present proceedings dealt only with the Synlait-burdened land, not the other parcels that remained subject to the covenant. The Supreme Court also commented on an application by Synlait to adduce further planning evidence, including as to the potential for residential rezoning and written approvals under s 104(3)(a)(ii) of the RMA – again highlighting the intersection of planning law and covenants – and on changes in the ownership of the land with the benefit and burden of the covenants, and population and planning changes in Pokeno.

PROPERTY LAW ACT 2007

The Supreme Court then turned to ss 316–317 of the PLA, noting recent amendments in respect of covenants and determining that it had a two-step test: (1) to determine if one or more of the grounds in s 317(1) was made out, and (2) to determine if its discretion should be exercised. The Court of Appeal had outlined a conservative approach to the exercise of powers under s 317 of the PLA, noting there should be "strong reasons" to justify extinguishment or modification of covenants (at [69]). The Court began by tracing the origins of s 317 of the PLA by reference to ss 127 and 126G of the Property Law Act 1952. Reference was made to a "progressive broadening" of the scope of orders under these provisions (at [76], citing *Harnden v Collins* [2010] 2 NZLR 273 (HC)), and a key argument of the appellant was that the Court of Appeal had been unduly conservative in its approach (at [72] and [80]).

The Supreme Court observed that the statutory language of s 317 should not be overlaid (at [84]):

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> *… with requirements that cases be exceptional, that sanctity of contract be protected, that property rights not be expropriated and the like. … There is a circularity about saying that property rights must be protected from the exercise of the power conferred by s 317 when the fundamental premise of the section is that those property rights are liable to be modified or extinguished.*

Therefore, the requirements of s 317 should not be overlaid with non-statutory criteria that would alter Parliamentary intention; rather, each case was to be considered on its own merits (at [85] and [88]).

The Court then proceeded to consider various factors under s 317(1) of the PLA.

Section 317(1)(d) – whether the modification or extinguishment would substantially injure any party

The High Court had found that the respondent would not suffer substantial injury if the covenants were extinguished, largely because NZIPL could seek a consent for quarrying with or without the covenants, and Synlait could oppose this application with or without the covenants as it owned land that was not burdened. The Court of Appeal had paid more attention to the restricted-discretionary activity status of aggregate extraction and held that NZIPL could suffer injury "of an intangible kind" (at [99]). The Supreme Court noted that the parties' undertakings meant that the Synlait plant would still be allowed on the Synlait land but that an obligation to not complain about NZIPL's quarrying would remain. It was noted that any injury under s 317(1)(d) had to be substantial, rather than insignificant, theoretical or fanciful, but could be economic, physical or intangible – including for example an intrusion upon privacy or loss of neighbourhood ambience (at [104]–[105]). The evidence for NZIPL was that development of a quarry was a possibility, supported by the zoning, and was plausible even if the land was developed for residential use. The Supreme Court then turned to "the planning implications" of removing the covenants, including the environment and the likelihood of resource consent for a quarry, with some criticism of the Court of Appeal's interpretation of the evidence (at [120]–[121]). The Supreme Court's conclusion was that the establishment of a quarry was possible, but there was real uncertainty as to it eventuating; that obtaining resource consent would be difficult; that if no resource consent application was made, there would be no substantial injury; and that the presence of the Synlait plant on the Synlait-burdened land would make little difference to the chances of consent. Because a consent application was unlikely, difficult and the plant would have little impact, there was no substantial injury to NZIPL.

Section 317(1)(a) – The covenant should be modified or extinguished because of a change in circumstances since its creation

The High Court had found that there were a number of changes in the nature and extent of the use of the land under s 317(1)(a)(i), including the subdivision and sale of large parts of the benefited land; the Court of Appeal had disagreed, as notwithstanding these changes, quarrying remained a real possibility. The Supreme Court agreed with the Court of Appeal, particularly as the quarrying resource remained within NZIPL land.

With respect to s 317(1)(a)(ii), the High Court had held that there had been a change in the character of the neighbourhood, with the increase in Pokeno's population, the establishment of new industry and residential development; the Court of Appeal did not agree, finding that the covenants were intended to last 200 years, and changes to zoning did not change the burden on the burdened land. However, the Supreme Court found that the fact that neighbouring areas were never subject to the covenant was irrelevant: the statutory question was whether changes in the neighbourhood justified modification of the covenant. That said (at [151]):

> *… a change in zoning is a factor that can be taken into account, not a decisive factor. … [O]n its own, a zoning change is unlikely to amount to a change in the character of a neighbourhood. If that were not the case, there is a risk of undermining the purpose of covenants designed to resist zoning changes.*

The implication here is clear and obvious but also worth reiterating: covenants exist independently of zoning. Covenants can override zoning; the reverse is not the case. It was noted that the zoning change was supported by the owner of the benefited land and predated Synlait's ownership of the Synlait-burdened land. The population growth, new residential areas, industrial zoning and manufacturing operations reflected "significant changes to the neighbourhood" (at [152]) and justified modification of the covenant.

Other relevant changes were able to be considered under s 317(1)(a)(iii), which relates to any other circumstances the court considers relevant. The High Court and Court of Appeal had been at cross-purposes about the ongoing utility of the covenants, with the Supreme Court having little to add to the Court of Appeal's assessment.

Section 317(1)(b) – the continuation of the covenant would impede reasonable use

The High Court had held that the continuation of the covenants was an impediment to reasonable use of the burdened land, with the parties not foreseeing the industrial zoning that later arose. The Court of Appeal, on the other hand, felt that the impediment to reasonable use had not arisen since the covenants were entered into, as the covenants continued to "provide a higher level of protection to the benefited land than zoning alone" (discussed in SC judgment at [160]). The future restrictions on use were foreseeable and known. In the Supreme Court's view, reasonable use was not static, and a change in zoning could be relevant to the nature or extent of an impediment to reasonable use. The reasonable use of the burdened land had changed because of zoning and the neighbourhood: the covenants prevented the burdened land being used at all without a resource consent. Further, knowledge of the covenants was irrelevant, as any applicant under s 317 would have known about their title and the presence of the covenant. The changes that had taken place in Pokeno could not have been reasonably foreseen when the covenants were entered into, and the impediment on the use of the land was greater than it had been because of the changes in the neighbourhood and potential use of the land.

Exercise of Discretion

The Supreme Court was therefore satisfied that the grounds in s 317 were made out. It then turned to whether it should exercise its discretion, noting that there were apparently no cases where one or more of the grounds in s 317 had been made out but discretion had been declined. The respondent argued that the covenants had a continuing purpose; a term of up to 200 years (of which only 20–22 had passed); that the burdened land had been acquired with knowledge of the covenants; and that they could not be replaced even if a future quarry went ahead. The Supreme Court, however, did not believe that the covenants had a sufficient continuing purpose, no matter how long they had to run; and that while they could not be replaced, the injury arising from their modification was not substantial. In addition, the Supreme Court declined to order compensation or even to refer that issue back to the High Court. In terms of costs, the Court also held that this action was not "enforcement" of the covenants in a way that allowed indemnity costs under the covenant terms.

As such, the appeal would have been allowed.

CONCLUSION

As noted above, the 'spilt milk' in this decision was the reality of the parties having settled. A cynic might say that the Supreme Court felt obliged to issue a judgment because of concerns that the Court of Appeal's decision might be followed in future, and the Supreme Court felt its junior court had so egregiously erred in law that this could not be allowed to happen. However, the Supreme Court's discussion of the differences in opinion between the High Court and Court of Appeal highlights that important legal issues were involved.

Property lawyers need a workable understanding of the RMA. RMA lawyers, particularly those involved in land development issues, also need a workable understanding of property law tools. Covenants can restrict land use in a way that overrides zoning provisions. Conversely, zoning changes can make covenants less purposeful and therefore less likely to be upheld. The *Synlait* decision shows both the constancy of change and the malleability of property law tools in achieving resource management outcomes.