IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA591/2020
[2021] NZCA 282

BETWEEN	PARWATI CHAND, RAM CHAND AND KHAN & ASSOCIATES TRUSTEE COMPANY (NO. 110) LIMITED Appellants
AND	AUCKLAND COUNCIL First Respondent
AND	CHAMROEUN KONG, KIMHENG CHHIT AND SOKCHAN ARUN KONG Second Respondents
AND	XUANYU HE AND QIUYU SU Third Respondents
AND	RAAD ELIAS AND SAHAR JAMEEL BAHNAM Fourth Respondents
AND	RAJESH PRASAD, VIJAY RAGNI PRASAD AND DR THOMAS LIMITED Fifth Respondents
AND	WILLIAM GORDON CHIPLIN AND THUY THI CHIPLIN Sixth Respondents
AND	LIM THI HOANG, TRAC XUAN BUI, TONG DUC BUI AND MEN THI LUU Seventh Respondents

Hearing:	10 May 2021
Court:	Miller, Venning and Peters JJ
Counsel:	R O Parmenter for Appellants D J Neutze and P Moodley for Respondents
Judgment:	30 June 2021 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the third to fifth respondents one set of costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Miller J)

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[1] The parties to this appeal own properties at Manukau which were part of an 8-lot subdivision completed by former owners, the Smyths, between around February 2007 and February 2012. All of the titles are both subject to and beneficiaries of covenants limiting subdivision and construction.

[2] The appellants, whom we will call the Chands, want to further subdivide their property, which is the Smyths' former home. It comprises approximately 2,229m^2 and contains a single dwelling. They seek to extinguish the covenant so far as it precludes

subdivision and dwelling numbers. They have put forward a proposal to subdivide into five lots.

[3] A covenant may be modified or extinguished under s 317(1)(d) of the Property Law Act 2007, if a court is satisfied that "the proposed modification or extinguishment will not substantially injure any person entitled…". If so satisfied, a court may order the applicant to pay "reasonable compensation as determined by the court".[1]

[4] The Chands failed to persuade Palmer J that the modification would not substantially injure the third to fifth respondents. The Judge accepted the evidence of the respondents' valuer, Peter Bates, that the modification would have a significant effect of about $100,000 on the value of each of their properties and for that reason would substantially injure them. The Judge dismissed the application with costs.[2]

[5] On appeal, the Chands say the Judge was wrong in fact and law. He was wrong in law because the valuation evidence that he accepted included a substantial component representing gain from the subdivision. That cannot be treated as an injury to the respondents, nor may it be taken into account when assessing compensation. He was wrong in fact because the actual injury to the respondents from the proposed subdivision was trifling. It largely comprised loss of amenity value during the construction phase and ought to be valued at between $7,000 and $10,000 per respondent.

The properties

[6] The properties depicted on the plan below are the lots formed through the Smyths' subdivisions. They range in area from 400 to 672 m^2.

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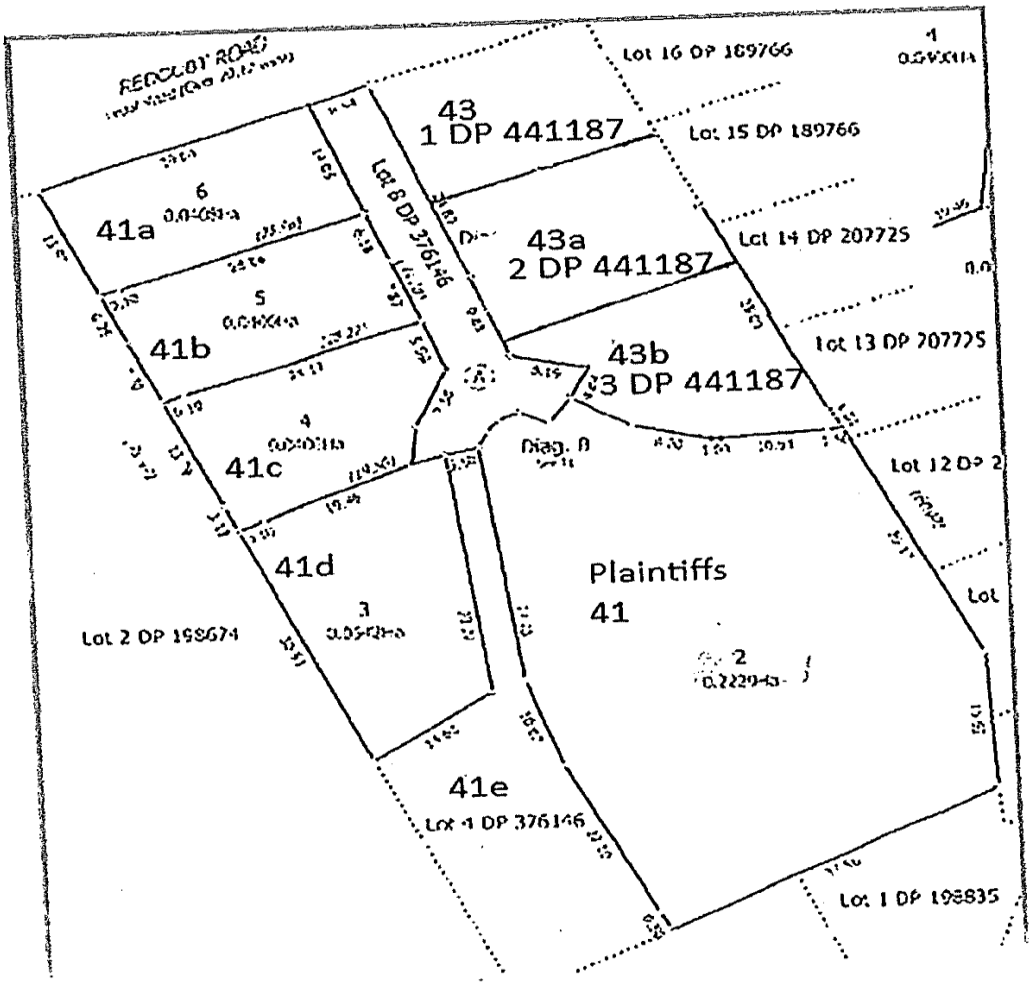
1 Property Law Act 2007, s 317(2).
2 *Chand v Auckland Council* [2020] NZHC 2422.



[7] The properties are now owned as follows:

(a) Lot No 41 is owned by the Chands. It is the property they want to subdivide. The Smyths sold it to the Chands in 2016 and no longer have an interest in any of the properties;

(b) No 41E is owned by the fifth respondents;

(c) No 41D is owned by the fourth respondents;

(d) No 41C is owned by the third respondents;

(e) No 41A and No 43 adjoin Redoubt Road and are owned by the Auckland Council, which acquired them for roading purposes;

(f) No 41B is owned by the second respondents;

(g) No 43A is owned by the sixth respondents; and

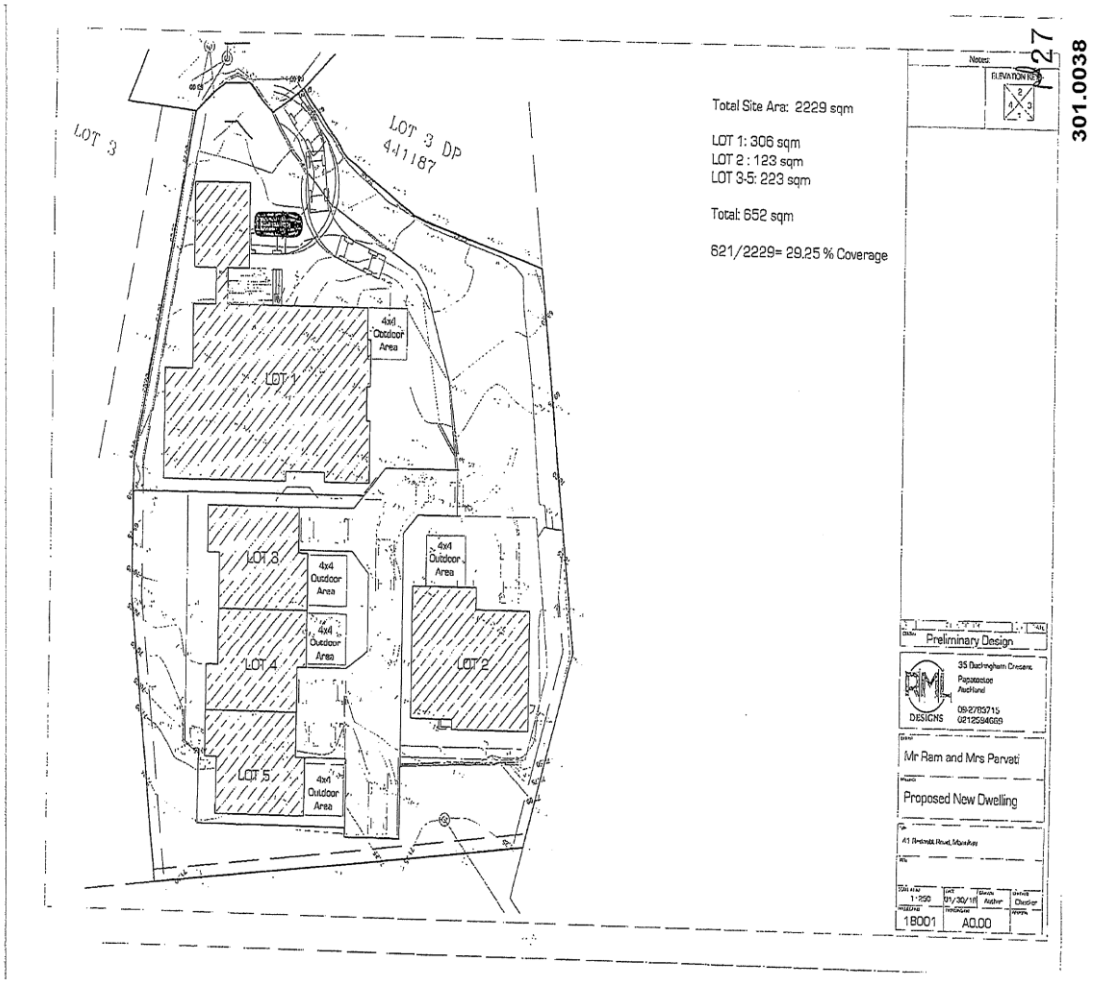
(h) No 43B is owned by the seventh respondents.

[8] We have listed the parties in this order because only the third to fifth respondents have taken part in this appeal. The Council and the sixth and seventh respondents have consented to the application and the views of the second respondent have not been disclosed.

The proposed subdivision

[9] The evidence is that the Chands wish to subdivide Lot 41 into five lots with an average size of around 446 m². Palmer J recorded that the development will comprise three two-level residential structures, two of which will comprise two units.[3] The proposal is depicted on the plan below:

[3] *Chand v Auckland Council*, above n 2, at [4].



[10] It seems this proposal is not necessarily final. On the evidence, the Chands have not offered the respondents any commitment to it. On the contrary, there is evidence that they altered the proposal, changing it from three lots to five, after the respondents resisted removal of the covenant. Nor have the Chands sought resource consent, saying that they wish to avoid the associated costs until they know whether the covenants will be modified.

The covenants

[11] A suite of rights was created via a memorandum of transfer from the Smyths to themselves. The transfer recites that it was their intention that the lots created would

be subject to "a general scheme[4] applicable to and for the benefit of" each lot. The scheme would run with the land; the owners and occupiers of any of the lots from time to time would be bound by it and able to enforce it.

[12] There followed a series of covenants: by way of example, not to use the land for any commercial purpose, not to permit any temporary building, not to use old materials when constructing any fence, to build within 12 months a house of superior design using modern materials, not to build more than one house, and not to subdivide (with the proviso that the Smyths might do so while they remained registered proprietors). The last of these covenants states that each owner agrees:

> (j) Not to further subdivide the property, including by way of cross lease or unit title or otherwise, so that each lot shall always remain in one Computer Register and contain only one dwellinghouse PROVIDED that the said [Smyths] while still Registered Proprietors of any of the said Lots may further subdivide any of the said Lots provided that any additional Lots shall always remain in one Computer Register and contain only one dwellinghouse AND the Registered Proprietors of any of the said Lots hereby consent to any such further subdivision by [the Smyths] and acknowledge that such further subdivision may result in access Lot 8 being shared by more than 8 Lots and will if called upon sign any documents necessary to give effect to any such further subdivision.

The application under s 317

[13] The application is described as an application to modify covenant (j), which we have just set out. It would do so by extinguishing the covenant so far as it binds Lot 41, leaving it in place with respect to the other lots. The application would permit the Chands or any future owner of their land to subdivide to the fullest extent permitted from time to time by the Auckland Unitary Plan.

The evidence of injury

[14] Palmer J accepted the evidence of Mr Bates that the Chands' proposed subdivision would have "a significant effect on the property values" of the respondents.[5] For that reason, the proposed modification of the covenant would substantially injure the respondents. He observed that they bought their properties

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4 For discussion of building schemes, see DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [17.025].

5 *Chand v Auckland Council*, above n 2, at [15].

with benefit of the covenant and the Chands bought theirs subject to it. He concluded that the statutory conditions for modifying the covenant were not fulfilled.[6]

[15] This approach to assessing injury requires that we turn to the valuer's evidence to establish what form the injury took.

[16] The evidence of some of the respondents was that the injury to them would take the form of loss of light and views, increased traffic, increased noise, and decreased property values. One of the respondents, Vijay Prasad, stated that a double-story, three-duplex complex would be built right up against their boundary fence and anticipated that at least 10 further vehicles would use the shared driveway, which in her opinion is already overloaded. Mrs Prasad is a real estate agent, and in her opinion subdivision would diminish the value of her property by between $200,000 and $300,000. Both she and another respondent, Raad Elias, produced a number of photographs depicting the existing properties. He considered that there would be a loss of light and views coupled with significant increase in traffic and noise. The development would completely change the character of the subdivision, which in his opinion presently has the character of a lifestyle block.

[17] Mr Bates did not characterise the respondents' properties as lifestyle blocks, preferring to describe them as residential lots. He characterised the impact as:

(a) noise and headlight disturbance from vehicular and pedestrian traffic;

(b) noise disturbance from post-construction use of the new dwellings;

(c) reduced visual privacy from the new dwellings;

(d) potential delays and risks when accessing the road as a result of increased traffic flow;

(e) noise and potentially vibration disturbance during construction;

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6 At [15].

(f) costs of needing to re-document the title; and

(g) loss of property rights "in a context where the property has an unusual advantage of being a residential lot with more light and air around it, as well as a garden and sky outlook compared [to] similarly zoned properties in the location". Mr Bates explained this last item in evidence as the loss of an opportunity to sell a property right to the owner of Lot 41 on a willing seller, willing buyer basis.

[18] Mr Bates explained that it is difficult to value the impact of more intensive subdivision on a residential lot given a lack of relevant sales data. In his opinion, though, density does affect value, and that value is increasing in an era where more intensive subdivision is permissible. He considered that the proposed development would result in the market value of the three remaining respondents' properties falling by $100,000.

[19] He also considered that on a willing seller, willing buyer basis the Chands would pay $300,000, and perhaps more, to be able to proceed with the subdivision. That would add a further $100,000 to the injury done to each of the three respondents by extinguishment of the covenant over Lot 41. In the result, each respondent would suffer a loss totalling an estimated $200,000.

[20] Before considering whether all these losses may be included in the assessment of injury to the respondents, we record our finding that the Judge was right to discount the evidence of the Chands' valuer, Warren Priest. Mr Priest considered that the respondents would suffer only a minimal loss of value, in the form of disruption during the construction phase and a marginal increase in traffic afterward. He quantified this at between $7,000 and $10,000 per respondent. He was disposed to discount loss of privacy on the ground that the extent to which the new dwellings will overlook the respondents' properties cannot be known until construction is complete. Presumably he takes the same view of noise and traffic levels.

[21] The difficulty with this approach is that the onus was on the Chands as applicants to show that the respondents will not suffer significant injury and to

persuade the Judge to exercise his discretion to grant a remedy.[7] It will not do to claim that the respondents' loss should be discounted now because it cannot be quantified until later, when the development is complete. We have mentioned that the proposal in evidence includes concept plans which might have been relied on, as Mr Bates did, to estimate harm.

[22] We agree with the Judge that the evidence sufficiently establishes the respondents will experience enduring injury, in the form of loss of view, loss of privacy and intrusion of traffic and noise, if the proposed development proceeds.

[23] We are not persuaded that Palmer J was wrong to accept the respondents will likely also experience loss of property values, or that he was wrong to accept Mr Bates's estimate. The Chands contend that because the respondents bought while the Smyths still owned the land the prices they paid must be taken to have reflected the same loss. However, there is evidence that they understood the Smyths did not intend to subdivide further, and there is no evidence of what density of development was permissible under the operative District Plan at the time. For their part, the Chands say they bought in ignorance of the covenant, paying a price that reflected subdivision potential. They appear to blame their advisers at the time. We do not reject that evidence but it can have no bearing on the issues before us. As between the parties to this litigation what matters is that they were on notice of the covenant.

[24] As we explain below, the assessment of injury, and hence compensation, must also recognise that by extinguishing the covenant against subdivision and housing density the Court is depriving the respondents of a valuable asset, in the form of a property right over the Chands' land. Mr Priest did not estimate the price that might be negotiated between a willing buyer and willing seller for surrender of that right. The Judge was entitled to accept, based on the proposal in evidence, that their loss was not less than that estimated by Mr Bates.

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[7] See Tom Bennion and others *Land Law* (online ed, Westlaw) at [CN5.01(3)], citing *Jansen v Mansor* (1995) 3 NZ ConvC 192,111 (CA); *Waikauri Bay Reserves Ltd v Jamieson* HC Auckland CP1981/87, 12 February 1990 at 13; and *Re Barfilon Investment Ltd* [2019] NZHC 780 at [23].

Section 317

[25] The section provides:

> **317 Court may modify or extinguish easement or covenant**
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> (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—
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> (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:
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> (i) the nature or extent of the use being made of the benefited land, the burdened land, or both:
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> (ii) the character of the neighbourhood:
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> (iii) any other circumstance the court considers relevant; or
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> (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
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> (c) every person entitled who is of full age and capacity—
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> (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or
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> (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
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> (d) the proposed modification or extinguishment will not substantially injure any person entitled; or.
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> (e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or
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> (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.

We note that subsections (1)(e) and (1)(f) were enacted in 2017.

[26] The legislation permits a court to take an owner's control over a covenant out of their hands, provided one of six criteria is met. Speaking generally, the first two criteria are available for a change in use or circumstances since the covenant was created. The third is available where an owner agrees, or has waived or abandoned their rights. The fourth, with which we are concerned, is available where the change would not substantially injury any person entitled. The fifth is available where the covenant is contrary to public policy or law,[8] and the last is available where for any other reason change is just and equitable.

[27] We need not subject the statutory language to much examination, but we do make several points of relevance to this case. The first is that s 317 contemplates a counterfactual analysis in which the court compares the state of affairs when the covenant or easement was created with the state of affairs resulting from the proposed exercise of jurisdiction. That comparison may include any change in character of the neighbourhood resulting from increased density of subdivision and development.[9]

[28] Second, subs (1)(e) resulted from the Law Commission's concern that covenants in gross, which benefit a person rather than land, ought not be imposed in perpetuity.[10] We mention this because, while the Chands did not plead subs (1)(e), they did invoke the public interest by pointing to provision in the Auckland Unitary Plan for more intensive residential land use. We prefer the view that changes of this kind may affect the character of a neighbourhood, or reasonable user, so affecting the original balance of benefit and burden and justifying intervention on that ground.[11] For purposes of subs (1)(d), with which we are concerned, regulatory changes of this kind may affect the injury that will result from a court's exercise of jurisdiction and the amount of compensation awarded where the injury was not sufficiently substantial to preclude intervention.

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8 See the discussion in McMorland, above n 4, at [17.001], n 16, instancing covenants that would be void under other Acts, for example the Human Rights Act 1993.

9 *Rental Space Ltd v March* (1999) 4 NZ ConvC 192,873.

10 Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [7.53]–[7.57].

11 Compare *Re Barfilon Investment Ltd*, above n 7, at [56], where the need for social housing was considered to be in the public interest.

[29] Third, there is a sense in which concern about transaction costs of bargaining may be said to underpin the jurisdiction, but it is notable that the statutory criteria do not include the expense of negotiating with a large number of people entitled to the benefit of a covenant. We make this point because Mr Parmenter, counsel for the Chands, understandably highlighted the difficulty of negotiating with all of the parties when urging us to resolve this case by making an order and fixing compensation.

[30] Finally, subs (1)(d) has been described, adopting the language of Russell LJ in *Ridley v Taylor*, as a "long stop against vexatious objections to extended user".[12] It is more than that. The jurisdiction under s 84 of the Law of Property Act 1925 (UK) was available where the modification would not injure the party entitled. Section 317(1)(d) is more extensive, allowing a court to intervene where the party entitled would suffer an injury, provided the injury is not substantial. The jurisdiction is not confined to cases in which resistance, or a request that modification be conditional on compensation, is deemed vexatious.

Loss of property rights an injury under s 317(1)(d)

The covenants against subdivision and building are property rights

[31] The parties agree that the covenants confer property rights on each of the owners of the benefitted land. That is plainly correct, if only because they confer rights over the land itself, not merely rights in personam against other contracting parties and their privies or successors. The covenants were intended to provide, for the benefit of all owners, an environment in which housing was low in density and of good quality. To that end, they run with the land, being enforceable by and against any future owner of any of the lots. We observe that the memorandum of transfer also envisages that rights under the covenants may be enforced by injunction or specific performance. It provides that any non-compliant structure must be removed on demand by any of the registered proprietors of the benefitted lots, and liquidated damages of $200 per day are payable while any breach continues.

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[12] *Ridley v Taylor* [1965] 1 WLR 611 (CA) at 622, cited in *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd* [2019] NZCA 147, (2019) 20 NZCPR 119 at [112]; and McMorland, above n 4, at [17.042].

Synlait: property rights relevant and can be significant in the exercise of discretion

[32] Palmer J did not have the advantage of the Supreme Court judgment in *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, which was delivered on 22 December 2020.[13] The Supreme Court did not decide whether loss of control over what a neighbour may do on their land is an injury for purposes of s 317(1)(d), or address compensation, but it did briefly survey the legislative history and policy of s 317.

[33] The Court explained that a conservative approach was traditionally taken to a jurisdiction that allowed courts to modify or extinguish property rights. Courts pointed to the absence of any power to award compensation.[14] Such a power was first established in the Property Law Act, in s 317(2). Commenting on it, the Justice and Electoral Select Committee explained that:[15]

> Such an order is, in essence, an expropriation of a private property right, and an award of compensation is appropriate in some circumstances. We consider there is a need to grant the court the ability to award compensation where appropriate.

[34] Speaking to the Bill on its second reading, the Hon Chris Carter, speaking for the Associate Minister of Justice, said:[16]

> The powers of the court are extended to include a power to make an order for compensation when modifying or extinguishing an easement or covenant. An example might be where an owner wants to redevelop land by building several houses on it, but the owner is prevented from doing this by a covenant in the original transfer of the land that restricts further building on the site. Although the owner could apply to the court to modify or extinguish the covenant, other people who benefit from the covenant may have their property rights adversely affected. Compensation may be appropriate in such circumstances.

[35] In *Harnden v Collins* Randerson J explained the courts' traditionally conservative approach to the jurisdiction:[17]

> First, applications under this provision have the potential to impact adversely on existing property rights, usually by diminishing or altering the benefit of

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13 *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, (2020) 21 NZCPR 672.

14 *Manuka Enterprises Ltd v Eden Studios Ltd* [1995] 3 NZLR 230 (HC) at 234; and *Harnden v Collins* HC Whangarei CIV-2009-488-571, 18 December 2009 at [24].

15 Property Law Bill 2007 (89-2) (select committee report) at 5–6.

16 (11 September 2007) 642 NZPD 11764.

17 *Harnden v Collins*, above n 14, at [24].

> the easement to the dominant owner or owners. Interference with property rights has always been treated seriously by the courts with reference being made on occasion to the "expropriation" of property. Secondly, the exercise of the power under this provision represents a statutory interference with the sanctity of the contract entered into by the dominant and servient owners or their predecessors in title. Thirdly, until s 317 [of the Property Law Act] was enacted, there was no provision for the court to order the payment of compensation as a means of ameliorating adverse effects on the parties impacted by the grant of an order under the section.

Randerson J found that the statutory history pointed to a progressive broadening of scope and a relaxation of courts' approach to use of their jurisdiction.

[36] Endorsing that view, the Supreme Court cautioned in *Synlait* against a too-conservative approach:[18]

> [84] We consider caution is necessary in overlaying the clear statutory wording of s 317 with requirements that cases be exceptional, that sanctity of contract be protected, that property rights not be expropriated and the like. Easements and covenants are created subject to the provisions of the Property Law Act, including s 317. The extent of the sanctity of the contracts underlying easements and covenants and the nature of the property rights they create are governed by s 317 (and other provisions). 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.
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> [85] We would not, therefore, overlay the requirements of s 317 with additional, non-statutory criteria that have the effect of altering the clear parliamentary intention that easements and covenants should be amenable to modification or extinguishment in defined circumstances (noting that the defined circumstances are broader in the case of covenants because of the new paras (e) and (f) in s 317(1)).

The Court held that it is no bar to the jurisdiction that the owner of the burdened lot is motivated by a desire to improve the enjoyment of their own property.[19]

[37] The Court stated that contractual and property rights can be significant, but not as a "generic fetter" on discretion; rather, each case must be considered on its own merits.[20] It concluded that s 317 calls for a two-step approach:[21]

> The court's first task is to determine whether one or more of the grounds in s 317(1) is made out. If so, the second task is to determine whether the

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18 *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, above n 13.
19 At [86].
20 At [88]
21 At [90].

> discretion to extinguish or modify the easement or covenant at issue should be exercised (and, if so, to determine whether compensation should be payable). The exercise of the discretion to modify or extinguish the easement or covenant requires consideration of all relevant factors (including the power to award compensation). We do not see any intent that any one factor should be disqualifying.

Compensation for loss of property rights at common law

[38] Speaking generally, a property right comprises a bundle of rights that the owner may exercise freely, protected from interference by others; or as Blackstone put it, property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the rights of any other individual…"[22] The owner is free to sell the thing, and only with their consent may it be alienated. Courts enforce these rights by injunction or specific performance, not by damages alone. The simple, clear and readily enforceable nature of property rights facilitates bargaining, so allowing the thing to find its most valuable use, provided the setting is one in which transactions costs of bargaining are low.[23]

[39] A court's characterisation of a right as a property right may have important consequences for loss occasioned by its expropriation or unauthorised use, as the United Kingdom Supreme Court explained in *One Step (Support) Ltd v Morris-Garner*.[24] At issue was the measure of compensation for loss of a valuable asset created or protected by contract.

[40] Delivering the principal judgment, Lord Reed held, citing the judgment of Nicholls LJ in *Stoke-on-Trent City Council v W & J Wass Ltd*, that the law does not confine the concept of loss or damage to "financial loss calculated by comparing the property owner's financial position after the wrongdoing with what it would have been had the wrongdoing never occurred".[25] Where a breach of contract results in loss of a valuable asset created or protected by the right infringed, "as for example in cases concerned with the breach of a restrictive covenant over land", the claimant has in

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22 William Blackstone *Commentaries on the Laws of England* (Vol 1, Clarendon Press, Oxford, 1765).

23 Guido Calabresi and A Douglas Melamed "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85(6) Harv L Rev 1089.

24 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649.

25 At [29], quoting *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 (CA) at 1416.

substance been deprived of a valuable asset and the loss can be measured by determining the economic value of the asset.[26]

[41] Lord Sumption, concurring in this respect, explained that:[27]

> … in general the law is concerned only with the specific enforcement of obligations or the money equivalent of their due performance. The exceptions in the case of trespass to or appropriation of property are justified by the nature of the right which the wrongdoer has infringed. Property rights confer an exclusive dominion over the asset in question. The law treats that exclusivity as having a pecuniary value independent of any pecuniary detriment that he might have suffered by the breach of duty.

[42] Lord Reed held that not every contractual right can be described as an asset, meaning that its breach can result in an identifiable loss equivalent to its economic value even in cases where the claimant suffered no pecuniary losses measurable by seeking to place them in the position they would have been in had the contract been performed. But a contractual right to control the use of land does fall into the "asset" category.[28]

[43] The Court held that what it called "negotiation damages" may be quantified by reference to "the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question".[29] The Court does not seek to reconstruct what the parties would have agreed had they negotiated a release; rather, it assumes a hypothetical willing buyer and willing seller, acting reasonably. This measure supposes that the contract was not performed but rather was replaced by a different contract. Nonetheless, the principle at work is compensatory. The court is merely estimating the economic value of the asset that has been lost (or in cases akin to trespass, the rent for its use).

Loss of property rights is compensable injury under s 317

[44] We have discussed property rights at common law to confirm that by refusing to insist on performance of a covenant over land a court may deprive the owner of a

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26 At [92].
27 At [110].
28 At [93].
29 At [95(4)].

valuable asset. The next question is to what extent that injury may be recognised under s 317. When exercising this jurisdiction the court is not responding to a defendant's breach of covenant. It is authorising extinguishment or modification in the exercise of discretion. Compensation is not available as of right, as it would be at common law.[30]

[45] Courts have treated the loss of an owner's property right as an injury in cases under s 317 and assessed compensation on a willing buyer, willing seller basis.[31] This approach can be traced to *Jacobsen Holdings Ltd v Drexel*, a 1986 judgment of this Court concerned with the statutory jurisdiction to grant reasonable access to landlocked land.[32] The Court held that the owner's loss included what Cooke P described as "potential", carrying with it the power to bargain with any would-be purchaser for whom the potential had particular value. He and Casey J cited *Nelungaloo Pty Ltd v Commonwealth*, in which Dixon J said that the loss "cannot be less than the money value into which the dispossessed owner might have converted his property had the law not deprived him of it".[33]

[46] In *MacRae v Walshe* this Court found it appropriate to take the same approach under s 317, reasoning that it is proper to apply consistent practice when the court is "essentially engaged in a similar task of valuing compensation for releasing value to the applicant in respect of previously restricted real estate".[34]

[47] We bear in mind that in the landlocked land cases compensation is being awarded to a respondent whose land is being taken, whether by purchase or easement. Compensation under s 317 is directed to loss of rights over another's land, and the statutory criteria for intervention envisage that a balance will be struck by reference to

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30 At [95(12)].

31 See for example *MacRae v Walshe* [2013] NZCA 664, (2013) 15 NZCPR 254; *Mikitasov v International Recruitment Partners Ltd* [2011] DCR 623; *Cambray North Island Ltd v Minister of Land Information* (2011) 12 NZCPR 721 (HC); *JT Jamieson & Co Ltd v Inland Road Ltd* [2013] NZHC 3313, (2013) 16 NZCPR 237; *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670; and *Parklands Properties Ltd v Auckland Council* [2020] NZHC 2919.

32 *Jacobsen Holdings v Drexel* [1986] 1 NZLR 324 (CA) at 328.

33 At 328 per Cooke P and at 335 per Casey J, citing *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 (HCA) at 571.

34 *MacRae v Walshe*, above n 31, at [60].

obligations agreed or assumed on purchase and any subsequent change in circumstances.

[48] That said, any price that reasonable parties would negotiate on a willing seller, willing buyer basis, with no question of compulsion on either side, must influence a court's assessment of reasonable compensation. The legislative history to which we have referred above indicates that compensation is intended to ameliorate the impact of an order on property rights, so facilitating exercise of a remedial jurisdiction. By its act the court deprives the owner of control of an asset, and possibly of the asset itself. Following *Synlait*, this forms part of the injury done by modification. It follows that the value of the lost asset may be reflected, to the extent the court finds appropriate in the particular circumstances, in the compensation awarded.

[49] For these reasons we reject Mr Parmenter's argument that loss of the respondents' property rights is not an injury for purposes of s 317 and cannot be the subject of compensation.

Substantial injury in this case

[50] Palmer J did not need to assess compensation because he found the injury to the respondents substantial and so refused an order. The central question on appeal is whether he was right about that.

[51] We begin by adopting what was said about the kinds of injuries that may be taken into account in *Mogensen v Portland Developments Pty Ltd*:[35]

> The injury may be of an economic kind, eg reduction in the value of the land benefited, or of a physical kind, eg subjection to noise or traffic, or of an intangible kind, eg impairment of views, intrusion upon privacy, unsightliness, or alteration to the character or ambience of the neighbourhood. … the subjective tastes, preferences or beliefs of particular individuals may, within limits of reasonableness, give rise to injury in the relevant sense to those individuals …

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35 *Mogensen v Portuland Developments Pty Ltd* (1983) NSW ConvR 56,855 at 56,856. In that case, an application was made to modify a restriction under the Conveyancing Act 1919 (NSW), s 89(1)(c), which allowed a restriction to be modified where the court is satisfied that the "proposed modification … will not substantially injure the persons entitled … to the benefit of the restriction".

[52] The injury in this case takes the form of what we have summarised as loss of view and privacy, intrusion of traffic and noise, loss of value of the respondents' properties, and loss of property rights over the Chands' land.

[53] We have also observed that it was for the Chands to show that the respondents would not suffer substantial injury if the application were granted, and that the application would allow any development permitted under the Auckland Unitary Plan from time to time. We have no evidence of what that might mean on this land.

[54] If that were all that stood in the Chands' way, we would remit the proceeding to the High Court so that terms on which the specific proposal in evidence binds the Chands may be settled, or the proposal revisited. The Chands might elect to mitigate its density and design. We are not persuaded, however, that the Judge was wrong to find that substantial injury would result from the proposal in evidence.

[55] We observe that it suffices that the modification would affect any one of the respondents' properties in a real and significant manner.[36] We begin with the physical and intangible injuries. These affected all three respondents, but particularly Lots 41D and 41E. Under the proposal, two two-storey structures containing four dwellings would be erected very near the boundary. There is a driveway between that boundary and Lot 41D, but not Lot 41E. In our judgement the impact on privacy and view for those properties would be substantial when compared with the counterfactual, a single dwelling on the Chands' land. Lot 41C would be less affected by loss of privacy, but it is situated close to the entrance to Lot 41 and would be affected by the substantial increase in traffic.

[56] As noted at [20]–[22] above, we are not persuaded that the Judge was wrong to find the proposal would cause loss of value of the respondents' properties, and he was entitled to accept Mr Bates's estimate of the value of their property right over the Chands' land.

[57] We observe that the loss of a property right over the Chands' land is not consequential on physical or intangible injury to the respondents' land. It differs in

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[36] *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, above n 13, at [104].

that respect from loss of value of their own properties. It is a pure economic loss which is fully compensable in money. From a policy perspective it is arguable that in remedial legislation of this kind such an injury ought not preclude modification, provided the compensation is adequate.

[58] However, *Synlait* holds that a court first assesses whether one of the statutory criteria for intervention — here, no substantial injury to a person entitled — is made out.[37] If so, the Court determines in the exercise of discretion whether to exercise the jurisdiction, taking into account the power to award compensation. We have considered whether *Synlait* might be distinguished, but the Supreme Court's decision rested in part on s 317(1)(d) and the Court appeared to conclude at [181] that compensation could not be taken into account when determining whether an injury was substantial.

[59] It follows that compensation must be ignored when determining whether the proposed modification or extinguishment will substantially injure any person entitled. The rationale presumably is two-fold. First, as a general rule compensation is not performance of a covenant or easement. It is a substitute of varying adequacy for performance. Second, the statutory criteria for intervention together indicate that the legislature envisaged intervention in established private arrangements must be justified. To say this is not to overlay additional requirements on the legislation. It is to recognise that each of the criteria requires that a threshold be crossed before intervention is permissible.

[60] It follows that all the injuries to the respondents must be considered when deciding whether extinguishment of the covenant so far as it binds Lot 41 would cause them substantial injury. We agree with the Judge that it would. We would reach this conclusion even if compensation for loss of the respondents' property right over the Chands' land could be taken into account when deciding whether injury to them would be substantial.

[61] For these reasons the appeal fails at the threshold. We need not address the quantum of compensation.

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[37] *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, above n 13, at [90].

Result

[62] The appeal is dismissed. The Chands must pay the third to fifth respondents one set of costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Graham & Co, Auckland for Appellants
Brookfields Lawyers, Auckland for Third, Fourth and Fifth Respondents