

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2019-404-1114
[2020] NZHC 2422**

IN THE MATTER of Part 19 High Court Rules and s 316 and
s 317 of the Property Law Act 2007

AND

IN THE MATTER of an application to modify and/or extinguish
a restrictive covenant

BETWEEN PARWATI CHAND, RAM CHAND and
KHAN & ASSOCIATES TRUSTEE
COMPANY (NO.110) LIMITED
Applicants

AND AUCKLAND COUNCIL
First respondent

Continued overleaf

Hearing: 27 July 2020

Appearances: R O Parmenter for the applicants
Appearance excused for the first respondent
P Moodley for the third, fourth and fifth respondents
No appearance for the second, sixth and seventh respondents

Date of judgment: 17 September 2020

JUDGMENT OF PALMER J

*This judgment was delivered by me on Thursday 17 September 2020 at 3.00pm.
Pursuant to Rule 11.5 of the High Court Rules.*

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Registrar/Deputy Registrar

Counsel/Solicitors:
R O Parmenter Barrister, Auckland
Graham & Co, Auckland
Brookfields, Auckland

CHAMROEUN KONG, KIMHENG
CHHIT and SOKCHAN ARUN KONG
Second respondents

XUANYU HE and QIUYU SU
Third respondents

RAAD ELIAS and SAHAR JAMEEL
BAHNAM
Fourth respondents

RAJESH PRASAD, VIJAY RAGNI
PRASAD and DR THOMAS LIMITED
Fifth respondents

WILLIAM GORDON CHIPLIN and
THUY THI CHIPLIN
Sixth respondents

LIM THI HOANG, TRAC XUAN BUI,
TONG DUC BUI and MEN THI LUU
Seventh respondents

Summary

[1] The parties all bought properties in a subdivision in Manukau, South Auckland. The titles are subject to a restrictive covenant preventing further subdivision, except by the original owners, the Smyths. The Chands bought the largest property from the Smyths and now apply to modify the covenant to allow them to subdivide it into five properties. They say that the modification will not substantially injure the respondents, under s 317(1)(d) of the Property Law Act 2007. But I accept the evidence of the respondents' expert valuer, Peter Bates, that the modification would have a significant effect on the value of each of the respondents' properties. I dismiss the application.

What happened?

Subdivision and covenant

[2] In 2007, Anne and Ransom Smyth subdivided their land at 41 Redoubt Road, Manukau, Auckland into several lots and an accessway. On 25 February 2008, a restrictive covenant was registered against the titles which required the owners, among other things:¹

(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 any effect to any such subdivision.

[3] In 2012, the Smyths created three lots from two of the lots, meaning there are now nine lots and an accessway. The Smyths retained the largest lot, of approximately 2,229 square metres. The third, fourth and fifth respondents (the respondents) purchased 41C, 41D, and 41E in February 2015, August 2012 and November 2015

¹ Bundle for Hearing (BFH) at 17.

respectively. Parwati and Ram Chand bought the largest lot from the Smyths in July 2016. A photograph illustrates the subdivision.²



[4] The Chands now wish to subdivide the largest lot to create five lots with an average size of around 446 square metres. The development will comprise three two-level residential structures, two of which will comprise two units. In order to do so, they apply to modify the covenant. Of the seven other owners:

- (a) The Auckland Council owns the front two properties and consents to the application.
- (b) The owners of two other properties also consent.
- (c) The owners of one property have not stated a position.

² Bundle of Valuation Evidence (BVE), at 103.

- (d) The third, fourth and fifth respondents (the respondents) oppose the application.

Evidence of effects of subdivision

[5] The evidence of Vijay Prasad, one of the fifth respondents, is that the Smyths assured them they would not undertake any further subdivision.³ She considers there will be significant adverse impacts of the intended development, including from loss of light and views, increased traffic, increased noise, and decrease in property value.⁴ The evidence of Mr Elias, one of the fourth respondents, is similar.

[6] Warren Priest is an expert valuer called by the Chands. He has regard to the fact that, when the Smyths owned the property, they were able to subdivide it under the covenant.⁵ He reasons that a prudent purchaser before the Smyths sold “should” therefore have factored into their purchase decision any negative impacts of future subdivision.⁶ He compares the prices paid by the respondents when the Smyths owned the property, with the sale prices of other properties at the times of the respondents’ purchases and concludes there was no discount. Accordingly, he considers the covenant has had no significant bearing on the value of the respondents’ properties and there is no loss of value in their properties.⁷ But he considers there will be noise, traffic and nuisance from construction which he assesses as worth \$7,000, \$10,000 and \$10,000 in relation to properties 41C, 41D and 41E respectively.

[7] Peter Bates is an expert valuer called by the third, fourth and fifth respondents. He considers the proposed subdivision would be detrimental to the use, enjoyment and value of the properties in terms of:⁸

- (a) noise and headlight disturbance from vehicle and pedestrian traffic;
- (b) reduced visual privacy due to the new dwellings to be constructed;

³ BFH 109 Affidavit of Vijay Prasad, 29 January 2020, at [7].

⁴ At [17]-[21].

⁵ BVA 114 Affidavit of Warren Priest, 15 June 2020, Exhibit A at [12.3].

⁶ At [12.3].

⁷ At [16].

⁸ BVA 29 Affidavit of Peter Bates, 17 March 2020 (Bates), Exhibit B at 20.

- (c) noise and potential vibration disturbance during construction;
- (d) noise disturbance post-construction from occupancy use of the dwellings;
- (e) increased traffic flows from and to the roadside of Redoubt Rd;
- (f) “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 [with] similarly zoned properties in the location”; and
- (g) requirements to redocument the title.

[8] He considers it would diminish the values of each of the properties of the respondents by \$100,000.⁹ Under cross-examination, he valued the loss excluding the loss of property rights at \$25,000.¹⁰

Relevant law

[9] Under s 316 of the Property Law Act 2009 a person bound by a restrictive covenant may apply for an order modifying it. Section 317 empowers the Court to do so and to require payment of reasonable compensation. But the Court may only modify a restrictive covenant 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

⁹ Bates at [10].

¹⁰ Notes of Evidence (NOE) 31/13-22.

foreseen by the original parties to the ... covenant at the time of its creation; 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.

[10] In *North Holdings Development*, Katz J held that if the pre-conditions in s 317 are met, the Court still needs to decide whether to exercise its discretion to make the order sought.¹¹ In *New Zealand Industrial Park Ltd v Stonehill Trustees Ltd*, the Court of Appeal emphasised restrictive covenants have the benefit that landowners “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”.¹² Of s 317(1)(d), the Court said:¹³

This ground has been described as a ‘longstop against vexatious objections to extended user’. The first issue is whether the proposed modification or extinguishment would cause injury to the dominant landowner. The second issue is the extent of any injury. The subsection requires that the dominant landowner 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’.

Submissions

[11] Mr Parmenter, for the Chands, submits that Auckland needs land and more houses. He submits an additional car or three on the driveway cannot be anywhere near a substantial injury. He submits a loss of privacy needs to be seen in its proper context and the real question is how much compensation the three respondents can extract. He submits, several times, the Court should stand back and look at what is happening: “in the middle of deepest, densest suburbia, someone is building a house

¹¹ *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670 at [55].

¹² *New Zealand Industrial Park Ltd v Stonehill Trustees Ltd* [2019] NZCA 147, (2019) NZCPR 119 at [54].

¹³ At [112] (citations omitted).

nearby”.¹⁴ He relies on Mr Priest’s evidence in submitting there is no substantial injury. He submits Mr Bates’ evidence is wrong and the absence or presence of the covenant “will make not a jot of difference to ‘Joe Bloggs’ as he stands at the driveway of 41d, contemplating purchase”.¹⁵ He submits the statutory threshold is met, the discretion should be exercised to grant the application and no compensation should be ordered.

[12] Mr Moodley, for the third, fourth and fifth respondents, submits the effect of the modification identified by Mr Bates would cause injury to the respondents which would be real and considerable and much more than insignificant or trifling. He submits the hypothetical entitlement of the Smyths to subdivide after the respondents purchased their properties is wholly irrelevant to the situation now. He submits the applicants have failed to demonstrate there will not be a substantial injury and, if they had, the discretion to approve the orders should not be exercised, and if it is, compensation of \$100,000 should be ordered.

Should the covenant be modified?

[13] I do not accept the evidence of Mr Priest. As Mr Bates said, it starts with the conclusion.¹⁶ It assumes the prices paid by the respondents for properties with a covenant binding the Smyths’ successors (but not the Smyths) would be the same as the prices they would pay for properties without such covenants at all. In essence, Mr Priest assumes there is no value in the covenant. He confirms that by comparison with the values of other properties at the times of the respondents’ purchases.

[14] But there is no good reason to assume the effects of the covenants on the Smyths’ successors have no value. The respondents’ personal estimations of value several years ago cannot reflect the impact of the covenant on the values of the properties now. The respondents’ willingness to pay lawyers to oppose the application suggests that they do value the absence of development by the Smyths’ successors, and therefore the effect of the covenant, now. Mr Bates’ analysis indicates that is also likely to have a market value. Because Mr Priest’s comparative analysis values

¹⁴ Applicants’ submissions, 15 July 2020, at [26] and NOE 41/25-28.

¹⁵ At [35].

¹⁶ NOE 8/23-27.

entirely different properties, not properties with and without these covenants, it does not help.

[15] I accept the evidence of Mr Bates that there would be a significant effect on the property values of the respondents. I can see no reason to question his methodology, reasoning or conclusions. For that reason, I accept the proposed modification will substantially injure the respondents. They bought their properties with the benefit of the restrictive covenant. The Chands bought their property with the burden of the restrictive covenant. The statutory conditions for modifying the covenant are not fulfilled.

Result

[16] I dismiss the application to modify the restrictive covenant and award costs on a 2B basis to the third, fourth and fifth respondents.

Palmer J