IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 115/2021
[2021] NZSC 179

BETWEEN	PARKLANDS PROPERTIES LIMITED Applicant
AND	FRANCIS MILES REYNOLDS AND JULIET LINELL REYNOLDS AS TRUSTEES OF THE F & J REYNOLDS TRUST First Respondents
	RICHARD NORMAN REYNOLDS AND KRISTEN SUZANNE REYNOLDS Second Respondents
	AUCKLAND COUNCIL Third Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	J E Hodder QC, J M Savage and P K J Roycroft for Applicant D M Salmon QC and D A C Bullock for First and Second Respondents S F Quinn and K H Rogers for Third Respondent
Judgment:	13 December 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the first and second respondents (collectively) costs of $2,500.

REASONS

[1] The applicant (Parklands) seeks leave to appeal against a decision of the Court of Appeal.[1] In that decision, the Court of Appeal allowed an appeal by the first and second respondents (the Reynolds) against a decision of the High Court.[2]

[2] The High Court judgment dealt with an application by Parklands for the extinguishment of an easement under s 317 of the Property Law Act 2007. Section 317(1) sets out a list of matters that may justify the extinguishment of an easement. The Court must be satisfied that at least one applies. If so satisfied, the Court then has a discretion whether to extinguish the easement or not. The High Court Judge found that the criteria in s 317(1)(a)(i), (ii) and (iii) were satisfied, but that the criteria in s 317(1)(b) and (d) were not. He then exercised the discretion in favour of extinguishing the easements. He awarded compensation of $300,000 to the Reynolds under s 317(2).

[3] In the Court of Appeal, the lead judgment was written by Venning J. He found that the criterion in s 317(1)(a)(ii) was made out, given the change in the character of the neighbourhood since the creation of the easements in issue. But he disagreed with the High Court Judge on the applicability of the other subparagraphs of s 317(1)(a). He also considered the High Court Judge was wrong about compensation and would have awarded compensation of over $4 million, most of which related to the amount allowed to the Reynolds as a share of the gain that the applicant would make if the easements were extinguished.

[4] Goddard and Peters JJ disagreed with Venning J about the satisfaction of the criterion in s 317(1)(a)(ii). They thought the change in character of the neighbourhood had not been established. This meant none of the matters set out in s 317(1) was made out and there was therefore no basis for the extinguishment of the easement. Although it was irrelevant given their main finding, they also dealt with compensation and reached a similar figure to that of Venning J, but on a different methodology.

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1 *Reynolds v Parklands Properties Ltd* [2021] NZCA 394 (Goddard, Venning and Peters JJ).

2 *Parklands Properties Ltd v Auckland Council* [2020] NZHC 2919, (2020) 22 NZCPR 1 (van Bohemen J).

[5] The upshot of all of this was that the appeal was allowed and the High Court orders extinguishing the easements and requiring payment of compensation were set aside.

[6] This Court considered the application of s 317 in some depth recently in *Synlait Milk Ltd v New Zealand Industrial Park Ltd*.[3] Parklands argues that the present case involves issues that were not dealt with in *Synlait* or arise in a different way in this case. We are not persuaded that is so. As we see it, the assessment on the main point of disagreement between the Judges in the Court of Appeal did not turn on an interpretation of the law but on the way the relevant judges considered the question of changes in the neighbourhood. Those are essentially factual questions, though the differing views within the Court of Appeal and between the Court of Appeal majority and the High Court means there is no unanimity on these issues.

[7] The first proposed ground of appeal concerns the Housing Accords and Special Housing Areas Act 2013 (HASHAA) and the equivalent provisions in the Auckland Unitary Plan. In essence, the argument is that, because the area was a special housing area under the HASHAA (now under the Auckland Unitary Plan), this amounted to a change in the character of the neighbourhood for the purposes of s 317(1)(a)(ii) and a change of circumstances for the purposes of s 317(1)(a)(iii).

[8] Although Venning J dealt with the HASHAA in his judgment, the majority of the Court of Appeal did not mention it at all (although they did agree with Venning J's summary of the background).

[9] Parklands says the impact of the HASHAA and its equivalent in the Auckland Unitary Plan on the s 317(1) analysis gives rise to a point of general or public importance and a point of general commercial significance. We do not consider that is so. Rather, it is essentially a question of fact as to whether the area becoming a special housing area since the easements were created amounts to a change in circumstances.[4]

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[3] *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657.

[4] The Housing Accords and Special Housing Areas Act 2013 has now been repealed.

[10] The second proposed ground deals with s 317(1)(b). Neither the High Court nor any of the Court of Appeal Judges considered this provision was engaged.

[11] The applicant refers to the continuation of the easement impeding reasonable use of the burdened land in a different way from what had been foreseen when the easement was created. The argument is that the easements were facilitative of development rather than intending to restrict it, something the High Court Judge accepted. The parties expected the easement land to eventually be a public road to unlock the development potential of the land.

[12] In *Synlait*, the Court considered this point briefly, but did not consider the facilitative/restrictive distinction. It is said this involves a matter of importance. Again, we consider this involves the application of the law to the facts and does not give rise to any significant point of law.

[13] The third proposed point of appeal concerns the history of dealings between the Reynolds' interests and Parklands. Parklands says that it surrendered its interests in certain easements to allow a company associated with the Reynolds to undertake a development, and expected reciprocity. It is argued this is an "other circumstance the court considers relevant" that should have been taken into account under s 317(1)(a)(iii). Parklands says that the informal arrangements between the parties were important significant contextual factors that should have been taken into account. We see that submission as an invitation to trawl through the factual history. We do not consider that it gives rise to a matter of public importance. What circumstance is relevant to a particular case is very contextual, and we do not think any generic guidance from this Court is required.

[14] The last proposed point of appeal relates to the level of compensation awarded under s 317(2). This Court did not consider that in *Synlait*. The High Court Judge, Venning J and the Court of Appeal majority all took different approaches, though the result from the two different Court of Appeal approaches was similar. There may well be merit in this Court giving guidance about this, but there is no point in giving leave on this point unless we also give leave on the earlier points.

[15] Our overall assessment is that, given the recent consideration of s 317 by this Court in *Synlait*, no matter of general or public importance or matter of commercial significance arises in this case.[5] Nor do we consider any miscarriage of justice arises.[6]

[16] The application for leave to appeal is dismissed.

[17] Parklands must pay costs of $2,500 to the first and second respondents collectively. The third respondent abided the decision of the Court, and in those circumstances, we make no award of costs in its favour.

Solicitors:
Kemps Weir Lawyers Ltd, Auckland for Applicant
LeeSalmonLong, Auckland for First and Second Respondents
DLA Piper, Auckland for Third Respondent

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5 Senior Courts Act 2016, s 74(2)(a) and (c).

6 Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].