IN THE SUPREME COURT OF NEW ZEALAND SC 108/2015

BETWEEN **ESCROW HOLDINGS FORTY-ONE LIMITED**
First Appellant

KALLINA LIMITED
Second Appellant

AND **DISTRICT COURT AT AUCKLAND**
BODY CORPORATE 341188
First and Second Respondents

GEORGE VICTOR WILKINSON
JEREMY KAY COLLINGE & Ors
Third to Twelfth Respondents

AUCKLAND COUNCIL
Thirteenth Respondent

CHANG TJUN CHONG & Ors
Fourteenth to Thirty-Ninth Respondents

Hearing:	28 June 2016
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	J G Miles QC, T J Herbert and R P Thomas for the Appellants G J Kohler QC and T M Bates for the Second to Twelfth Respondents

CIVIL APPEAL

MR MILES QC:
May it please Your Honours, I appear for the appellant, together with Mr Herbert and Professor Thomas.

ELIAS CJ:
Yes, thank you Mr Miles, Mr Herbert, Mr Thomas.

MR KOHLER QC:
As Your Honours please, Kohler appearing with Mr Bates for the Respondent.

ELIAS CJ:
Thank you Mr Kohler, Mr Bates. Yes Mr Miles.

MR MILES QC:
Your Honours, just a couple of minor issues to start with. I've taken the trouble of incorporating what we regard as the key documents into one volume. There are only about 11 of them but otherwise you're all over the place.

ELIAS CJ:
Yes, thank you.

MR MILES QC:
So I produce that and we have also dug up I think a further three academic articles dealing with these issues, a couple of them published in the Law Journal in May and June, and another one in the New Zealand Conveyances – sorry it's the UK Conveyancer, dealing with the issue of interpretation of documents and with Your Honour's leave I will hand up those three documents and the bundle.

ELIAS CJ:

Yes, thank you. Are you going to be referring to the articles Mr Miles?

MR MILES QC:

No I'm not really.

ELIAS CJ:

Then why are they coming in.

MR MILES QC:

I just thought they might be useful for Your Honours.

ELIAS CJ:

All right, background, thank you.

MR KOHLER QC:

Could I just say something about the articles Your Honours?

ELIAS CJ:

Yes Mr Kohler.

MR KOHLER QC:

There are three, and I was given them about 10 minutes ago, but I immediately confess I had seen one of the articles a little earlier myself. The other two, one is by Associate Professor Thomas, who I understand from my friend is intending to make submissions in addition to my friend, and I don't know if he's going to be citing his own article or whatever it may be. I haven't read the article because I've just been handed it.

ELIAS CJ:

Well Mr Kohler, you can make any submissions that relate to it, if the submissions are developed by the appellants. It doesn't sound as if they're necessarily going to be.

MR KOHLER QC:

Well I'm going to have very limited time, Your Honour, because I haven't read, one of them I have read, but the other two I haven't read at all.

ELIAS CJ:

Well Mr Miles may not even refer to them at all Mr Kohler.

MR KOHLER QC:

Yes. Well I won't be able to assist Your Honours with any real submissions if I don't have time.

ELIAS CJ:

All right, well if it's necessary to obtain submissions from you after you've considered them, we'll give you time, thank you.

MR KOHLER QC:

Thank you Your Honours.

ELIAS CJ:

Yes Mr Miles.

MR MILES QC:

They're purely background articles, Your Honours, discussing *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305 (English CA) and *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 (Australian HC) and the cases that I'm going to be discussing with Your Honours. I propose to run the primary arguments Your Honour. Professor Thomas is here to talk to Your Honours if necessary on the rather esoteric topic of numerus clausus, which we touch on. It don't think as a concept it's going to be determinative, but it is raised in the submissions as part of our argument that the covenant was misconstrued and turned into a sort of hybrid right and this principle that we're talking about is part of the academic background to why that would be inappropriate. As I say we touch on it in the submissions but –

ELIAS CJ:

Well it's your argument Mr Miles. We'll hear what you want to present to us. I'm not sure that we're necessarily going to be in a position to invite further submissions if you don't have them necessary to develop.

MR MILES QC:

I propose, well we'll see how it develops Your Honour. Now if I could just take you briefly to the judgment in the question and I will be talking to my submissions, Your Honours, so perhaps it would be helpful if you had them in front of you while I'm discussing the issues that we refer to. But the judgment is found in the blue volume, volume A. It's the last tab, tab 14. Your Honours will recall that the Court of Appeal overturned the judgment of Justice Peters. We say Her Honour got it exactly right and for all the reasons we've advanced the Court of Appeal wrong. Now if we go to the judgment you'll see at paragraph 6 that the Court was well aware of a fundamental issue of commonality of ownership. They recalled at that paragraph, "In 1989 when Lots 2, 3 and 4 were created by the subdivision, the title to each half share in Lot 4 was amalgamated with the titles to Lots 2 and 3 respectively. This amalgamation of titles was required as a condition of the subdivision that created Lot 4."

So Your Honours we have two adjoining, basically there were three lots. Two and three were commercial properties, separately owned. Lot 4 was tacked on to Lot 3 I think, and that was owned also by the owners of Lots 2 and 3, and essentially it was regarded as their carpark. Lots 2 and 3, of course, had parking as well but it was clear that once those lots were developed, further parking was needed, to Lot 4 was literally the carpark for the owners of those two buildings. And the Council agreed to that as a fundamental condition of the subdivision in 1989. So when we're talking about rights of owners 2 and 3, as it were, on 4, it has nothing to do with any covenants, easements, agreements, they have the right. they owned undivided half share, each of them, in Lot 4. So they had the right, pursuant to ownership, to come onto Lot 4 any time they liked. What the parties recognised was that since it was going to be a parking lot for 2 and 3, it was

essential that the rights that the respective owners had on that undivided, on Lot 4, would be regulated. So the deed they entered into regulated what part of the parking on Lot 4 was allotted to the owners of 2, and what part was allotted to the owners of 3. So the deed correctly said, this is an issue of management of Lot 4. No right to come on because the right existed out of commonality of ownership. And that's at the heart of the reasons we say that the Court of Appeal got it wrong, because the Court, having recognised that the paragraph I've taken you to, that commonality was an essential component of the subdivision, then ignored that obvious point and concentrated on the deed, reformulated the deed into what they described as a positive covenant, giving the owners of Lots 2 and 3 the right to come on and park, it didn't. It had nothing to do with the right to come onto the land. It had everything to do, to manage the specific positions where they parked on Lot 4, once they got there.

O'REGAN J:

Well didn't it, though, amount to a concession by the Lot 3 owners that only the Lot 2 owners could use certain parts of it and vice versa. So it basically modified the rights they would otherwise have had as owners, didn't it?

MR MILES QC:

Yes it did Your Honour, which is a classic covenant. So the owners of Lot 4, being the owners of Lots 2 and 3, restricted their rights on Lot 4, so that they subservient –

O'REGAN J:

Well they got better rights because they would have only had a shared right to certain areas and now they're got an exclusive one, so they were granted something new, weren't they?

MR MILES QC:

No, Your Honour, because they had the right either 2 and 3 could park wherever they liked.

O'REGAN J:

Well yes, but what if it was full? This gave them the ability to exclude the others, didn't it?

MR MILES QC:

Well yes but it was still essentially a restriction on the rights of the owners.

O'REGAN J:

Well it's an enhancement of their rights, isn't it?

MR MILES QC:

Well it's an enhancement – well, that's what a covenant does. A covenant, a negative covenant requires the owner of the, the subservient owner, to restrict himself from doing something for the benefit of the neighbour, the dominant owner. So, yes, Your Honour, in that sense that's exactly what the covenant did. But that didn't, in itself, give any right to come onto the land. That was a consequence of ownership.

O'REGAN J:

Well, okay, but it was a, that was a pointless exercise if there wasn't a right to go on the land. No one would have entered into this document if they didn't –

MR MILES QC:

Of course not.

O'REGAN J:

If it wasn't a common understanding that they were going to be entering the land –

MR MILES QC:

Absolutely and that's what the parties understood in 1989, that's what the Council understood. That's why the Council granted leave and insisted, as a requirement –

O'REGAN J:

But they also insisted that that applied for 999 years, didn't they?

MR MILES QC:

Absolutely, but it was the commonality of ownership that was also the condition and that's the condition that was actually was to be found under the deposited plan. It was a condition, if you like, indicated to the world that that was the deal and it was, if it was –

O'REGAN J:

Well doesn't the new owner take it subject to that. If that was notice to the world?

MR MILES QC:

Quite. So the new owner takes it on the basis that there has to be commonality of ownership. By the way, Your Honour, there were two reasons. It wasn't just the management of Lot 4. It also, crucially to the Council, gave access for 2 and 3 through 4, out to Hargreaves Street, and without that access, and they only had access because they owned 4, without that access they couldn't get to Hargreaves Street, and that was considered also a fundamental issue for the Council. So both of those reasons were crucial to the subdivision and they're recorded on the deposited plan. The resolution confirming this and the condition itself. Notice to the world that this is the deal.

GLAZEBROOK J:

Have we got that in this.

MR MILES QC:

Yes, I'll come to that. Well if, could I just continue just to take you through the key findings of the judgment. You've got the reference to the relevant paragraphs of Justice Peters' judgment, that's at paragraph 14. She said at 88, "I accept the submission of counsel for Escrow and Kallina that it was never intended that the Land Covenant would confer a right to park on or

provide access over Lot 4. That was unnecessary, given the amalgamation of the titles."

And at 89, "I accept the submission of counsel for Escrow and Kallina that the rights of a registered proprietor… to an undivided half share in Lot 4, would include a right to travel over the land." That's just commonality of ownership, and that they enjoyed those rights until it was de-amalgamated in 2006.

ELIAS CJ:
Mr Miles, I'm not sure that I quite understand paragraph 88 because the regulation of use, well it's really the point that's being put to you. I don't see that the amalgamation of ownership delivered everything that was intended by this transaction.

MR MILES QC:
No, it didn't Your Honour.

ELIAS CJ:
No.

MR MILES QC:
But it provided the essential first step, which was the right to come onto the land.

ELIAS CJ:
Well it might but it might be taking away. I'm just querying the conferring a right to park and provide access.

MR MILES QC:
Well no because the right to park existed but it would have been unstructured and chaotic.

ELIAS CJ:
Chaotic, yes.

MR MILES QC:

Chaotic. So the two owners got together and said, well, we'll restrict our rights on 4. We'll agree we won't park everywhere. We'll agree that we'll only park in the area described as A on the plan or your Lot 2, or if you're the other lot, B, C, D and E, whatever is set out in the plan. So we'll restrict our rights because of good management of the place and that will suit our tenants because bear in mind, Your Honours, these were two commercial buildings. And it was an attractive deal for the owners because they were saying to the tenants, not only, of course, will you pay us rent for the offices, but we'll give you parking beside the building in Lot 4, and here's the plan, and of course we'll charge you for that as well. But it needed good management. But what is fundamental is the construction by the Court of Appeal that the right to come on the land could be found in the deed, and it couldn't. There was no need, and that's why they deliberately structured it as a covenant, not as an easement. Of course if they were different owners it would have been open to Lots 2 and 3 to say, an easement over Lot 4, but they didn't do that because they knew it was unnecessary and besides they were the same owners, so you don't normally get, you can't get an easement where the ownership is the same in both the dominant and subservient tenement. So when I come to the document itself it is totally consistent with the proposition I'm advancing.

Now the respective arguments are set out correctly at 16 and 17. Then Her Honour let Their Honours discuss *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 and the relevant views in *Zurich*. Crucially at 22, well, I suppose at 21, "We acknowledge that there are divergent views on the extent to which extrinsic evidence should be taken into account in interpreting instruments registered against a title." That's something a permanent Court may wish to consider unless, so in this case, to take into account extrinsic evidence regarding the circumstances existing at the time of the subdivision, nor later when they're amalgamate, de-amalgamated, "Because we are satisfied that it would not alter the conclusion we have reached as to the ordinary and natural meaning of the words."

So what Their Honours said was, we don't have to look at extraneous documents because the meaning of the deed and the encumbrance is so clear, but we can come to a clear view on that without bothering about the extraneous documents.

I, with all due respect the Court of Appeal, would agree. You can come to a clear view on the deed and the encumbrance but the clear view is the one expressed in the recitals, not the one, I would say, re-invented by the Court of Appeal.

Now their conclusions really starts, I think, at paragraph 44. The argument advanced by Mr Herbert in the Court of Appeal recorded at 43, which I would say is entirely correct, that's the proposition I've just been advancing to Your Honours, but it says at 44, "This argument fails to recognise the effect of the encumbrance. It is clear from the face of that instrument that the Council required the covenant as a condition of the subdivision." Correct. "No basis on which to infer that the Council had any interest in how the owners of Lots 2 and 3 regulated their relationship." Correct. It's very much in the interests, that's what they get onto in the next sentence. "It is reasonable to infer that, in approving the subdivision – "

ARNOLD J:
Just on that, the Council did have an interest in regulating the relationship to this extent. That is that it required a certain number of parking spaces to be made available for one building, and a certain number to another.

MR MILES QC:
Correct Your Honour. And access to Hargreaves Street. So it had a very strong interest in that, and that's why the conditions they'd insisted on recorded that. What it didn't have an interest in was 29 parks will be in position A, and 17 in position B, C, D and E. That's the management, if you like. So that is crucial, Your Honour, and that's the next sentence. "Reasonable to infer that in approving the subdivision the Council had an interest in ensuring that there would be adequate car parking for the

development." Well, it's not a question of "reasonable to infer". If Their Honours had actually read the relevant extraneous documents, being the key documents in the Council, the will have found that that was precisely their interest, and reflect that the conditions that ultimately appeared on a deposited plan.

Now at 46 she says, "We are, however, satisfied that the substance of the covenant was a positive one, notwithstanding the negative wording. First, whilst the literal meaning of the language is negative, the natural and ordinary meaning of it is positive. In ordinary language, to say that 'no one other than X may use the car park' will always be understood as meaning that 'only X may use the car park'. Excluding all but one identified person from using the car park is simply another way of saying…". Of course that's correct, but it completely ignores the fact they don't need all of that because they already had the right to be on it.

GLAZEBROOK J:
I think you just said the plain meaning of the words favours your view, but you're saying you have to look back at the history to see there was commonality of ownership.

MR MILES QC:
If I said that, Your Honour, I didn't mean that. What I was trying to say is that had they bothered, they wouldn't have had to say you can infer it, because it's quite obvious. But they didn't even need that because the commonality of ownership was part of the recitals of the deed. So when you come to 47, "Cl 3 is not to be read in isolation from the other covenants… particularly the various positive obligations imposed on them to meet substantial costs," and they point out a number of those ancillary obligations that inevitably arise when you're managing a carpark building which you jointly own.

Then at 48, if you incur expenditure, that can be a relevant consideration in determining what the covenant is and then at 49, "As noted above, positive covenants can now be enforced against successors," that's correct.

"Nevertheless, this statement indicates that if expenditure is required.. in favour of the covenant being a positive one." This, of course, assumes there's just one covenant in the deed, whereas the deed itself talks about covenants and I think the most, the clearest view of this, is that there is the primary covenant, that is the restrictive covenant restricting the rights of the owners of Lots 4, in the way we've talked about plus then it says of ancillary rights and obligations that the owners have adopted as a consequence of owning a building.

Now we get onto more significant errors, with all due respect, to 50. "The deed has no commercial purpose unless the covenants as a whole are interpreted as imposing positive obligations; there is no commercial purpose in the owners of Lot 4 incurring obligations to keep the building in good repair, if they do not have to allow it to be used. There is no commercial purpose," et cetera, for having a right, as they would put it, to go onto the land, but not being allowed to do so, and having to pay the outgoings on the building while not being given the right to go on there in the first place, and if that was what was intended at the time the deed was entered into, then I'd agree, it's a commercial nonsense. But what the Court has failed to point out is that the commercial absurdity only arose 16 years later in 2005 when the very condition that the Council insisted on was set aside. In the intervening 16 years it worked perfectly. It provided the carpark for owners 2 and 3. That's what the parties intended when they entered into the deal –

O'REGAN J:
When you say they intended after 16 years it would become absurd.

MR MILES QC:
No Your Honour. They intended that to be forever, subject to the consent of the Council, because the Council always had the right to re-think it. I think that's section 308.

O'REGAN J:
So what's wrong with giving effect to that intention?

MR MILES QC:

Well it's irrelevant when assessing the commerciality of the agreement in 1989. They're saying it was absurd because this is the impact, this was the consequence of construing the document in that way, but it wasn't. In 1989, the parties, I assume, considered forever because that was the condition of the deal going through, but commonality of ownership would mean that 2 and 3 always had the right to come onto 4. So it was never needed to give them an easement, they had it. Nothing absurd at all about 1989 and Their Honours in the Court of Appeal bought into my friend's argument that of course it's absurd because look at the current position and, of course –

O'REGAN J:

Well that's pretty undeniable, isn't it?

MR MILES QC:

Totally.

O'REGAN J:

It's ridiculous if you have to pay for something you're not allowed to use.

MR MILES QC:

Absolutely and the proper way –

O'REGAN J:

So what's your answer to that?

MR MILES QC:

You do what we did. You apply to the District Court, I think it's the District Court, to have that condition set aside, varied or whatever, under, what is it, section 318 of the Local Government Act 1974 there's a change of circumstances. That's totally –

ELIAS CJ:

Sorry, which condition?

MR MILES QC:

The fact that the Council unilaterally, it was on the application of one of the owners. The other owner, who owned an undivided half share in Lot 4, had no idea that the application –

ELIAS CJ:

Sorry, but what's the – the condition is the condition of amalgamation of titles?

MR MILES QC:

Yes, of commonality, amalgamation exactly.

ELIAS CJ:

So you apply to set aside the decision of the Council that that condition no longer applies, is that right?

MR MILES QC:

Well, you apply to the Court and you say that has happened. The commonality has now been broken. You have the absurd position now that Lot 2 can't now get onto its parking lot and Lot 4, which has the parking building, can't charge. All it's doing is charging for the overheads. It's not charging for the, its making no money out of it either. So it's an absolutely, it's an absurd result for both sides, and that's why my client applied to the District Court to have those, to have the position –

ARNOLD J:

Well it may not be absurd from the owners of Lot 2's position. Lot 2 is a unit title development now, is it?

MR MILES QC:

Yes Your Honour.

ARNOLD J:

And they may well have purchased the carparks with their units.

MR MILES QC:

Well they may have.

ARNOLD J:

So it's not absurd then is it?

MR MILES QC:

Well by that stage Lot 4 had been de-amalgamated so what they didn't buy were parking lots on Lot 4. They may have bought parking lots within Lot 2, but not Lot 4, because –

ARNOLD J:

So what was the date of the unit title development?

MR MILES QC:

The original one was 1989 and then the de-amalgamation was 2005 and the, then the owner then turned the office block into unit titles.

ARNOLD J:

Right, so that was after the de-amalgamation.

MR MILES QC:

The de-amalgamation.

ARNOLD J:

Right.

MR MILES QC:

And again I understand the evidence –

O'REGAN J:

And who parked in the building after that?

MR MILES QC:

Well the owners of Lot 2 did issue some licences to the tenants, indicating that was the only basis on which it could be done, then that stopped and the owners, my client, again Mr Herbert will correct me if I'm wrong here, but a sort of de facto position I think was, no –

UNIDENTIFIED MALE SPEAKER: (10:30:18)

(inaudible)

MR MILES QC:

Allowed to park but without prejudice to the arguments we had, and so my client permitted them to drive onto Lot 4 and park but without prejudice.

O'REGAN J:

And is that still the position?

MR HERBERT:

At the moment of course under the Court of Appeal judgment they have the right to park by that declaration so they're parking under that Your Honour.

MR MILES QC:

Yes, but no paying.

ELIAS CJ:

I don't understand the ambulatory absurdity that you say is the consequence of the Court of Appeal decision, that it wasn't absurd in 1989 but it became absurd in 2005, because surely it's the same interpretation point and it's just that the point wasn't taken. I'm not sure why you say it became absurd.

MR MILES QC:

Because the deal in 1989 was conditional on this fundamental condition granted by the Council, that the owners of Lots 2 and 3 should own Lot 4. So they could come onto Lot 4 any time they liked, but they'd be regulated once they're on it, and that's what the parties, and that's how it worked for

16 years. Then unbeknown to my client the current owner of Lot 2 in 2005 applied to the Council to have that condition altered, and the reason for it was, and it's a most unsatisfactory reason if I put it at its most neutral, where the owner said, Lot 2 has sufficient parking, we can use stackers hence you don't, the fundamental requirement isn't needed because we don't need Lot 4, and the Council unilaterally as it were, not advising the other owner, went along with that. Of course the stackers weren't in existence then and they never eventuated. As a consequence the then owner was able then to make some money by selling his share of Lot 4 to another party, while of course making whatever profit he could from turning –

ELIAS CJ:
No, look, I'm sorry, I understand the sequence of what happened, but if the argument is that there was no absurdity in interpretation in 1989 of the covenant. I'm not sure why it matters. The argument for interpretation could have equally have been advanced in 1989 as in 2005 when it became necessary to advance it.

MR MILES QC:
Can I put it this way Your Honour. In 1989 the parties knew exactly what all the, all the extraneous circumstances were understood –

ELIAS CJ:
Well it all worked.

MR MILES QC:
It all worked.

ELIAS CJ:
Yes.

MR MILES QC:
It all worked, that was the deal, and every deal, of course, comes, can, has the potential to come unstuck if something else occurs which, either

unexpected or whatever it might be sometime down the track, and that's all that happened here. It didn't, for one moment, alter the meaning of the deed. The meaning of the deed remains what it is and the time for construing it, of course, is when it was entered into. But unfortunately what the Court of Appeal did was essentially saying it was absurd back in 1989 because they'd have to because, I mean that's just stage 1 interpretation because it's an absurdity, overlooking completely that far from being an absurdity it made complete sense and operated sensibly for 16 years.

WILLIAM YOUNG J:
It could have operated sensibly on the basis that it was implicit.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
That there was a right to park, albeit a belt and braces right, because that was also a right associated with co-ownership.

MR MILES QC:
Well an easement would have done it. You could either do it two ways Your Honour. You could insist on commonality of ownership in which case the right arise directly out of ownership. Or you could grant a couple of easements.

WILLIAM YOUNG J:
But couldn't you do it by way of positive covenant. Do you say it's not possible?

MR MILES QC:
Not possible Your Honour because the essential difference between an easement and a covenant of course is an easement gives rights to the dominant tenement to come on to the subservient owner and, you know, like rights away and other standard easements, whereas a covenant is solely

concerned with the conduct of the subservient owner. He or she is restricted from what he or she can do on their land or on a positive covenant something they do on their land to the benefit of their neighbour.

WILLIAM YOUNG J:
Why can't it be restricted from excluding someone from using the land?

MR MILES QC:
Well, that depends on whether they were entitled to come on the land in the first place Your Honour. If they're entitled to come onto the land, then you can restrict their use. If they're not entitled to come onto the land, it doesn't matter what you do on your land because they can't come onto it. You can only do that through an easement.

WILLIAM YOUNG J:
Well can't, for instance, mortgages confer rights on a mortgagee to come onto land to serve notices or to inspect or something of that sort?

MR MILES QC:
That's gone beyond my rather detailed and limited knowledge in this area Your Honour. But that's quite different –

WILLIAM YOUNG J:
I understand that you can say well there's a pigeon hole and we have easements, and there's another pigeon hole here and we have covenants, but is there authority for the proposition that a covenant cannot be affected to require the covenantor to permit others to come onto the land.

MR MILES QC:
If you go to the definition of a "restrictive covenant" in the Property Law Act, that wouldn't cover that situation Your Honour because it concentrates on conduct by the subservient owner, restraining his or her rights in some way, or as a positive covenant obliging him or her to do something in respect of their land, for the benefit of their neighbour.

WILLIAM YOUNG J:

But can't there be a covenant in gross, that's not tied to, it's tied to a group of people rather than to an owner of land?

MR MILES QC:

I understand not, Your Honour.

WILLIAM YOUNG J:

We'll get this later will we?

MR MILES QC:

Yes, you'll get it, indeed. But when we come to the deed, Your Honour, you'll see that it is deliberately worded, not only in terms of a standard restrictive covenant, but also it notes that it's to be noted on the title pursuant to what was then section 126A of the Act, which can only be applied to covenants, not to easements. Now coming back, Your Honours, to 52. "For these reasons we are satisfied that the purpose of the covenant was to confer on the owners of Lots 2 and 3 the right to use Lot 4 for parking." Well, we say absolutely not. That right was as a consequence of ownership. And when read in its entirety, in light of that purpose, "The substance of the promises made in the covenant was to confer the right on the owners of Lots 2 and 3 to use the car park on Lot 4." Not at all. That's not what the deed says and it was never intended to say that. "It is implicit," note they're driven to use implicit, "that this right carries with it the right to use the access-ways in and out of the car park." It doesn't. They had that right as owners and hence allowed the appeal.

ELIAS CJ:

Sorry, they're tenants in common in this ownership, are they?

MR MILES QC:

Ah, tenants in common.

MR HERBERT:

They were.

ELIAS CJ:

They were.

WILLIAM YOUNG J:

Were they equal or unequal shares.

MR HERBERT:

Equal shares.

MR MILES QC:

Equal shares, undivided

O'REGAN J:

But they had an unequal number of carparks as it turned out, didn't they?

MR MILES QC:

Correct, yes. That was the private deal, if you like.

ELIAS CJ:

But, I really cannot remember, and the legislation has changed anyway, but there are means of regulating by common ownership aren't there?

MR MILES QC:

Yes, and that would be, and this would be an example of how it could be done.

ELIAS CJ:

Well it can be done by covenant which is what happened here.

MR MILES QC:

Yes.

ELIAS CJ:

But if not presumably you have to make an application to the Court, as you do over –

MR MILES QC:

If you're land-locked or…

ELIAS CJ:

Yes, or the easements, well all of those sort of things.

MR MILES QC:

Sure, sure.

ELIAS CJ:

I just really feel that you should be able to skin this cat in different ways, and it's difficult not to think that the Court of Appeal skinned it one way, which was perfectly open to it. So you still need to convince me that really what, the way the Court of Appeal – it all turns on whether it's a negative or positive covenant, does it, in your argument?

MR MILES QC:

No, it doesn't Your Honour. What it turns on is a proper construction of the deed and what the deed intended to set out and it's probably appropriate to come to that now.

ELIAS CJ:

Yes, to come to the deed, yes.

MR MILES QC:

We set out, Your Honours, in our written submissions, just in the paragraph 2, the failures of the Court of Appeal, and we've covered failing to give proper weight to the plain meaning of a negative covenant. Failing to pick up the issue of commonality of ownership. Failing to recognise the parties intended to restrict the rights of owners of Lot 4 rather than granting the rights to come onto the property. D, failed to take into account contemporary and relevant documents which were material to. E, when assessing the change of parties to the covenant, wrongly took into account a change of circumstances 16 years later, and at F, the cumulative effect of the judgment was to redefine

the concept of a restrictive covenant and to create a hybrid interest between a covenant and an easement. We say an interest unknown to law and what that is, is a positive covenant that granted the dominant owner the right to come onto the servient owner's property. That's a hybrid instrument which is somewhere between a covenant, it's effectively a covenant incorporating the rights under an easement, and that's unknown to our law.

We set out, Your Honours, over the next few pages the summary of the relevant facts that led up to the 1989 subdivision and the 2005 de-amalgamation and it would be helpful, I think, now if you could have a look at the bundle of key documents. We start with the deed, the memorandum of land covenants, which I just have been describing as the deed. You'll note that –

GLAZEBROOK J:
Well I would if I could find it. What is it?

MR MILES QC:
We handed this up.

GLAZEBROOK J:
Okay.

ELIAS CJ:
Tab 1?

MR MILES QC:
Tab 1 Your Honour. Now you'll see right there at the intituling, in the matter of section 162A of the Property Law Act. If you go to our bundle of authorities we've given you that bundle, that reference. That's at tab 1 and the second page of that gives you 126A. It's a capital A, they've got a small a, that's just a mistake. But you'll see that section deals with notification of covenants.

ELIAS CJ:

Sorry, where is it, it's not in the bundle?

MR MILES QC:

It's the bundle of essential authorities. And tab 1, Your Honour.

ELIAS CJ:

Yes, thank you.

MR MILES QC:

And page 2. You'll see page 1, you've got the interpretation of a positive covenant down the bottom, "Covenant to undertake to do something in relation to covenantor's land that would beneficially affect the value of the convenantee's land." So it's something the covenantor undertakes to do on his land.

GLAZEBROOK J:

And you say that can't include letting somebody onto it?

MR MILES QC:

No. Always done by easement, Your Honour.

WILLIAM YOUNG J:

Is there any authority for the proposition that the pigeon holes are quite as arbitrary –

ELIAS CJ:

Rigid.

WILLIAM YOUNG J:

– as you say they are, so firm, so well separated?

MR MILES QC:

Well, you've certainly got the definition of covenants, positive and negative, and there's, the definition of an easement, which we have just taken from Hinde and McMorland but which seems to be pretty much accepted by –

WILLIAM YOUNG J:

I understand, I can see that an easement would work. But why can't there be a covenant to permit someone to come onto land or a negative covenant not to stop them coming on land?

MR MILES QC:

I think –

WILLIAM YOUNG J:

A covenant to give someone leave and license.

MR MILES QC:

Well, I think the short answer, Your Honour, is that neither by statute nor by common law has a right been noted, and I think the reason for it – and Professor Thomas would be able to speak more authoritatively than me on this, but actually the basic distinction is that an easement is always involving a right given to the dominant owner to go on to the – you understand.

WILLIAM YOUNG J:

Yes, unless it's an easement in gross.

MR MILES QC:

Quite. And whereas the covenant by common law and then as expressed in the Property Law Act, is specifically designed just to restrict the right of the owner in some way, and that might be not to use his land in a particular way or to use his land in a particular way, to paint a building, or not to use his part of his land as a carpark or, you know, whatever it might be. That's simply how our law has developed.

ELIAS CJ:

Sorry. Section 126A of the Property Law Act. What's the argument you make on that?

MR MILES QC:

It's just a technical point, Your Honour. Under this section covenants are noted. There is a – and again, Professor Thomas explains all this to me but I'm – easements are registered, covenants aren't.

ELIAS CJ:

Yes.

MR MILES QC:

Covenants are noted on the farm. There is a reason, I think it goes back to equity or some basis.

GLAZEBROOK J:

And is there a point to that?

MR MILES QC:

No.

GLAZEBROOK J:

Does that matter in any way to the argument?

MR MILES QC:

Only an indicator, Your Honour, that we're talking covenants here, not easements, that's all.

GLAZEBROOK J:

So, okay…

MR MILES QC:

Neither more nor less than.

GLAZEBROOK J:

That's fine.

MR MILES QC:

So we then get into the –

ELIAS CJ:

Sorry, and what – because 126A is about positive and restrictive covenants…

MR MILES QC:

Yes.

ELIAS CJ:

So what's the…

MR MILES QC:

Doesn't matter, either covenant. If you have a covenant it doesn't matter whether it's positive or negative, you have to notify it on the title, and that's notice to the world.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Is there a definition of restrictive covenant? Because I've only got the positive ones but it stops at P but…

MR MILES QC:

It's the opposite, Your Honour, they just add a "not" or something in there.

GLAZEBROOK J:

All right, so it's just of –

MR MILES QC:

And we've actually got it further on somewhere…

GLAZEBROOK J:

All right, I know. It doesn't matter, I just wondered.

MR MILES QC:

Now it's the recitals to the deed which seem to me to be the –

ELIAS CJ:

Sorry, I still don't – I have a terrible cold so I'm not thinking very straight, so you must excuse me. But I still don't understand why post a system of notification and notice to the world it is useful to maintain a distinction between positive and negative covenants.

MR MILES QC:

Well my argument doesn't depend on that Your Honour.

ELIAS CJ:

All right.

MR MILES QC:

It is, in fact, a restrictive covenant, but my argument doesn't much matter, it doesn't matter whether you want to call it a positive or a restrictive covenant because either way it just deals with obligations on the part of –

ELIAS CJ:

Of the subservient tenement, yes.

MR MILES QC:

Exactly Your Honour. So it doesn't matter really, from my point of view. What is important is that it's a covenant not an easement and what the covenant is and this is where the Court of Appeal got it wrong, that it indicated that the covenant gave the dominant owner the right to come on and covenants can't do that, and it was never intended to do that, and that becomes clear when you look at the deed itself, and in particular the recitals.

GLAZEBROOK J:
But if I understand you don't have authority that explicitly says so?

MR MILES QC:
I'm sure Professor Thomas will have an authority Your Honour. So we'll come back to that. There's certainly no indication in any of the authorities I've seen that –

GLAZEBROOK J:
No I got that point. And of course the fact there's no authority may be just because it's so patently obvious that's the case. And one often doesn't find authorities for things that might seem patently obvious for that very reason.

MR MILES QC:
And, of course, you do go back to the statutory definitions as well.

GLAZEBROOK J:
Yes.

MR MILES QC:
Okay, the recitals. A and B, which are important because A and B simply record the fact that both the covenantor and the convenantee, which were –

GLAZEBROOK J:
Just, we're at tab 2, aren't we?

MR MILES QC:
I'm sorry, I'm back onto tab 1 Your Honour. One of the key documents.

GLAZEBROOK J:
Okay.

MR MILES QC:
Back in 1989 they were the owners of Lots 2 and 3 and Recital A says that one of them is the registered proprietor of an undivided one half share in Lot 4

and Lot 2. Recital B says exactly the same but it deals with the other owner, Lot 3. That covenantee has Lot 3 and an undivided half share of Lot 4. So crucial commonality of ownership. Recital C, "The covenantor and the covenantee wish to register certain land covenants," clearly plural –

WILLIAM YOUNG J:
Just pause there. You couldn't really have granted an easement.

MR MILES QC:
I think you could, yes I understand –

WILLIAM YOUNG J:
Because City Realties was the only owner of Lot 2.

MR MILES QC:
I think you could grant two, Your Honour, over the respective shares. So Lot 2 could grant an easement over Lot 3's undivided half share of Lot 4, and vice versa. A bit technical but unnecessary, of course, because of that commonality but conceivable. So three, or C, both parties wish register to certain land covenants, see, that's plural. Again pursuant to 126A. For the good management of the whole of Lot 4. And note the deposited plan 126975 because we're saying that the deposited plan is of course a document that anybody with notice of the world of essential issues on that title, and one of the documents you would look at when construing the deed. To accept you need to. And then a series then of really subsidiary covenants dealing with the management of the parking lot which they both own.

O'REGAN J:
The type that appears in capitals to the right-hand side of the page after "Recital C" just sort of seems to hang there. What is that? What's that part of?

MR MILES QC:

Yes, we think, Your Honour, you see the dash after "Lot 2" on the next line down in the capitals? The covenantor being the registered proprietor of Lot 2 dash, and the covenantor's share of Lot 4, we think that that just is –

ELIAS CJ:

Oh it's an insert?

MR MILES QC:

Insert.

ELIAS CJ:

Yes.

O'REGAN J:

That's pretty enigmatic isn't it?

ELIAS CJ:

It's not that old is it, 1989? I think they had word processors that could make the amendments.

O'REGAN J:

Okay well I'll take your word for it. I mean that does seem to make sense. It does read properly.

MR MILES QC:

Yes, and I suspect if you go to – I was about to say you'd expect to see that in the –

O'REGAN J:

And it's not there.

MR MILES QC:

It's not there. Fortunately, Your Honour, I don't think, nothing's going to hang on it.

O'REGAN J:
Nothing turns on it, yes.

WILLIAM YOUNG J:
But it doesn't actually follow the model on the next two pages on.

MR MILES QC:
That was just the point Your Honour. I confidently assumed it would, only to find it doesn't. Again it, that's certainly logically what it ought to mean but I say it doesn't matter.

ARNOLD J:
So these operate, looking at 1.1, so Lot 2 plays a 24th share of 39 shares of all the costs relating to control management maintenance, or resulting from the use or occupation of 24 of the 39 sites. So they get…

MR MILES QC:
What they get, they get the equivalent, the parking lot, and you see that in the, I'll take you to the plan in a second, Your Honour, which is annexed to the document.

So all of this, and you come to paragraph 3 I suppose, which is the covenant that just defines the restrictions of the use of Lot 4. That the registered proprietors of Lot 4 shan't use their, will not use their land, so that's restricting their rights, by not using or occupying that portion of their land allotted to Lot 2, to the owners of Lot 2, and that portion of the land allotted to Lot 3, and they specifically pick that up with the references in the map where they say B, C, D and E, is part of Lot 3's rights.

ELIAS CJ:
Sorry, where do we find the plan?

MR MILES QC:
This is paragraph 3.

ELIAS CJ:

No, where do we find the plan?

MR MILES QC:

It's annexed to the – it's about five or six pages on.

ELIAS CJ:

Yes, I see.

MR MILES QC:

I'll come to that in a second Your Honour. But that just defines the restrictions entirely consistent with Recital C and so on. Now if I could just take you to the drawing –

GLAZEBROOK J:

There's quite a lot about the registered proprietors from time to time of Lot 4, said in 3 and in 8.

MR MILES QC:

I think that just recognises, Your Honour, that the ownership might change, but it will always have to be linked with 2 and 3.

GLAZEBROOK J:

Where does it say that, just in the recitals or somewhere else?

MR MILES QC:

No it's –

GLAZEBROOK J:

Or is that in the Council's document that you're taking that from?

MR MILES QC:

Not only in the Council's documents but on the deposited plan, which I haven't taken Your Honours to yet.

GLAZEBROOK J:

No, I'm just asking where it comes from.

MR MILES QC:

No, it doesn't.

GLAZEBROOK J:

It's not in this document, it's…

MR MILES QC:

No.

ELIAS CJ:

But on the face of this document different ownership of Lot 4 is not unenvisaged?

MR MILES QC:

Correct. So long as Lots 2 and 3 and were also owners of Lot 4.

ELIAS CJ:

But why do you say that?

MR MILES QC:

Because that's the Recitals A and B recording that –

O'REGAN J:

Well, they record the status quo, they don't say that.

GLAZEBROOK J:

Well, that records the present, a current position. But you say that commonality requirement comes from the deposited plan?

MR MILES QC:

Quite, yes. So if this was the sole document we were talking about different issues of construction might arise. My point, my basic point, is that the deed

is entirely consistent with the fundamental condition of the subdivision and you find that condition registered on the deposited plan.

ARNOLD J:
Just completing this point about from time to time. The definitions clause of, clause 12, defines "covenantee" and "covenantor" in a way that includes successors in title.

MR MILES QC:
I'm sorry, Your Honour, I didn't get your question.

ARNOLD J:
Clause 12.

MR MILES QC:
Yes.

ARNOLD J:
It's the definition of "covenantee" and "covenantor" –

MR MILES QC:
Yes.

ARNOLD J:
– which is quite broad.

MR MILES QC:
Of course it doesn't say, "And by the way there always has to be the commonality," but it's consistent with that being a requirement, and you go to the deposited plan to find the condition.

ARNOLD J:
Yes, no, I understand. But I'm just at the moment looking at this document and…

MR MILES QC:
Sure.

Mr Herbert's just correctly pointed out, Your Honour, that when you go back to the parties you'll see that one of the lots, the covenantee, which is the owner of Lot 3, but it had joint owners even then, Lakeland and Upland, so it always envisaged that there would be different owners but –

GLAZEBROOK J:
What's the point about the joint owners? There's no –

MR MILES QC:
No, no.

GLAZEBROOK J:
– point – it's all right.

MR MILES QC:
No, no, there's no significance.

GLAZEBROOK J:
I just worry every time somebody mentions something in case there's a significance that's escaped me but…

MR MILES QC:
I understand, Your Honour.

Now could we just then go to the plan briefly, because you'll see that there are two drawings there: one plan of level 1 and one plan of level 2.

GLAZEBROOK J:
Is this the one we're looking at that's in this document?

MR MILES QC:
Yes, it's annexed to the deed.

GLAZEBROOK J:

So is this part of the deed that you would find –

MR MILES QC:

Yes.

GLAZEBROOK J:

– if you were searching, or is it just…

MR MILES QC:

No, no, it's part of the deed, Your Honour.

GLAZEBROOK J:

It is part of the deed.

MR MILES QC:

And you'll remember I read out that clause that talked about where the parking lot in A and B, C, D were.

GLAZEBROOK J:

No, I understand that, I'm just checking that…

MR MILES QC:

No, this was annexed. So this is described as, "Plan of carparking building." Now I don't was to over – you know, when I was first instructed on this, Your Honours, and, you know, we were talking about the carparking building, and I must say I sort envisaged a seven-storey carparking building. This is literally you drive in – if you just look at this plan you'll see on the right-hand level 1, the plan of level 1, which is that drawing, and you'll see, "Entry and exit to basement," do you see that written in there on the right at the bottom of that right-hand drawing of that triangle, "Entry and exit to basement." Now that is level 1 of the carpark, it's a basement with, I don't know, 20 or 30 carparks, and the next floor up is just bitumen, is just the parking lot, if you like, for, you know, it's just open bitumen.

ARNOLD J:

Maybe you could, if you look at volume C, part 1 at page 396, that photograph there –

MR MILES QC:

Sorry, which page is that, Your Honour.

ARNOLD J:

396 of volume C, part 1.

MR MILES QC:

Yes.

ARNOLD J:

So is that the entry into the basement?

MR MILES QC:

That's the entry, at 396.

ARNOLD J:

And the other part of the parking building is that open bit on top of it, is it?

MR MILES QC:

Exactly, at 398.

ARNOLD J:

Right.

MR MILES QC:

So that's all it is.

ARNOLD J:

Yes.

MR MILES QC:

If we just keep 396 there. You see the driveway going up to what I can tell you Hargreaves Street, we'll come to that in a minute, but that's the access that the Council was talking about that Lots 2 and 3 had no access to Hargreaves Street down here, other than this right of way over another lot. So if you just keep that in the back of your minds. Coming back to the drawing –

GLAZEBROOK J:

And in this, just for completeness, what's that building by the basement entrance?

MR MILES QC:

That's the right – if you're going back to the drawing –

GLAZEBROOK J:

Of 396? No.

MR MILES QC:

Yes, but 396 shows the drawing referred to –

GLAZEBROOK J:

So 396 you've got the entry in and the basement entry.

MR MILES QC:

Correct.

GLAZEBROOK J:

What's the main building in the picture there and where is it?

MR MILES QC:

Oh, that's nothing to do with it.

GLAZEBROOK J:

It's nothing to do with it. It's not Lot 4?

MR MILES QC:

I don't think that's even owned by my client.

GLAZEBROOK J:

No, just for completeness. So that's totally separate?

MR MILES QC:

Totally separate. So –

GLAZEBROOK J:

And while we're on the pictures though, so 397, that's the top of carpark where you've got cars parked?

ARNOLD J:

Yes, that must be coming, keeping on…

MR MILES QC:

Yes, because you can see the driveway coming up from Hargreaves Street –

GLAZEBROOK J:

And 398…

MR MILES QC:

More of the –

GLAZEBROOK J:

What are the buildings?

MR MILES QC:

That is the apartment block, so that's Lot 2.

GLAZEBROOK J:

So Lot 2?

WILLIAM YOUNG J:

That's the building on Lot 2.

MR MILES QC:

Yes.

GLAZEBROOK J:

Okay. It just helps to be able to visualise slightly these things.

MR MILES QC:

Yes, quite. And Lot 3 is – that's in the background, isn't it, that's behind it, the building which you just get a glimpse of.

GLAZEBROOK J:

Okay.

WILLIAM YOUNG J:

So that's Lot 3?

MR MILES QC:

Yes.

GLAZEBROOK J:

And the carparks are parked in Lot 4, are they?

MR MILES QC:

Yes.

GLAZEBROOK J:

The cars are parked in Lot 4, yes.

MR MILES QC:

Yes. So, back to the drawing?

GLAZEBROOK J:

Absolutely. Sorry, I just thought while we were there we might as well do that.

MR MILES QC:

Oh, no, it helps. So we have the plan of level 1, described as "basement parking area", that gate – the heavy black line is the outline of the building. So the description of the various carparks, you've got A, and if you look to the details on the right that's carparks for Lot 2, and then B, C, D and E are carparks for Lot 3, so you've got a little one for C on the basement and – oh, and B, another very small one on the basement, and on the top you've got D and E.

Now key points, F and G, F on basement and G on the upper parking deck, you'll see if you go to the drawing on the left, on the top you can see G, that's just an access area within the building to their respective slots. What is significant though is that if you look at that triangle to the left of the building, outside the building and identify in the basement drawing as entry and exit to basement. So if Your Honours see that triangle, that's land, empty land as it were, part of Lot 4 but not covered by the building and what, inevitably, follows from the deed in 1989 and the condition of the subdivision was that Lots 2 and 3 could drive down from their buildings, down into the access for both the top and the bottom, but driving across part of Lot 4. That triangle has to be driven across to get into the basement.

No that worked perfectly, of course, in 1989 because they all owned it. Lots 2 and 3 owned that. Once the titles were de-amalgamated and ownership passed into separate titles, Lots 2 and 3 no longer had the right to go across that land. Well, actually, Lot 3 did because they still had a share in Lot 4, but Lot 2, the crucial one, no longer had the right to go across.

You will also see, when I take you to the deposited plan, that that triangle I'm talking about was also crucial to giving Lots 2 and 3 access to Hargreaves Street, because if you go back to 396, that photo indicating that area, that's the area which is owned by Lot 4 but which Lots 2 need to come

across, not only to enter into the basement but to drive down into Hargreaves Street. So when the Council, as it did, made this conditional not only on Lot 4 being a parking lot for 2 and 3 but also it provided access to Hargreaves Street. It doesn't have it now.

O'REGAN J:
So on the plan that we're looking at, in what direction is Hargreaves Street? Is it –

MR MILES QC:
Bottom.

O'REGAN J:
Is it effectively below what we can see?

MR MILES QC:
Exactly.

O'REGAN J:
Right, I see.

WILLIAM YOUNG J:
Sorry, so Lot 2 no longer has any – there is no easement?

MR MILES QC:
Correct.

WILLIAM YOUNG J:
So it's been mentioned – so why is it not landlocked?

MR MILES QC:
It can come in from round the other side, Sir.

WILLIAM YOUNG J:

There's access another way?

MR MILES QC:

There's another street. It's all a bit confusing. Hargreaves Street seems to be under several streets.

WILLIAM YOUNG J:

It seems to be disconnected when I looked at it on Google.

MR MILES QC:

Yes, but, no it has access to another street.

O'REGAN J:

And when people in the unit development in Lot 2 got the licences to park in the parking building, did they also get licences to cross over from Hargreaves Street into the parking building?

MR MILES QC:

I'll check with Mr Herbert but I would assume so. I'll check on that.

WILLIAM YOUNG J:

But they could get there via – or there'll be presumably a rather tight turn.

MR MILES QC:

They could get there via another way but it's awkward because then they have to go right back and around rather than just shooting straight down.

WILLIAM YOUNG J:

Okay.

MR MILES QC:

All right, well that's the drawing. Now just staying –

GLAZEBROOK J:

This isn't the drawing that you were referring to that is clear that you have to commonality in ownership?

MR MILES QC:

No, coming to that.

GLAZEBROOK J:

Right.

MR MILES QC:

Let's come to that, but let me just take you to the encumbrance, which is the next document at tab 2. That just – the encumbrance, it's a form – I mean Your Honours will know it's just a form of mortgage which conveyancers were forced to use and to record a right by the Council to enforce the condition that they'd entered into during the subdivision. And I think the – I mean once again we've got the, on the third paragraph if you like, Roman numerals (iii), the Council has agreed to consent to such subdivision on the condition to the encumbrances enter into these agreements. At paragraph 2, the encumbrances covenant with the Council, that except with the prior consent of the Council they won't permit their land to be used. So it's always open for the Council to consent to a different arrangement. So the encumbrance simply is a vehicle just for ensuring that conditions that have already been agreed can be enforced, I'm not sure it has any other significance than that.

O'REGAN J:

So was this encumbrance still on the title when unit holders were buying?

MR MILES QC:

Yes, and continued actually. What they got rid of was the deed –

WILLIAM YOUNG J:

I missed that.

MR MILES QC:

Sorry. The encumbrance is still on the title but the – so that remains there. So the Council can still enforce an obligation to use it as a carpark, but it has nothing to do with the issue of whether are rights other than –

ELIAS CJ:

Use rights?

MR MILES QC:

Yes.

GLAZEBROOK J:

But the owners of Lot 4 can't use Lot 2's carparks for anything else?

MR MILES QC:

Correct.

O'REGAN J:

So what are they trying to achieve, commercially?

MR MILES QC:

Well, they applied to the Court to get the whole thing re-done.

O'REGAN J:

So what do they want to do, pull the parking building down and build something?

MR MILES QC:

Well, it's a very – I'm just saying this, Your Honour, but it's clearly an uneconomic use of the land as it stands.

GLAZEBROOK J:

And why is that though?

MR MILES QC:

Well…

GLAZEBROOK J:

I mean, just because – what's it to your client because –

MR MILES QC:

Well, it's a stalemate at the moment, Your Honour.

GLAZEBROOK J:

Well, no, but your client still has the carparks attached to Lot 3 –

MR MILES QC:

Yes.

GLAZEBROOK J:

– which was the whole basis, and so what?

MR MILES QC:

But as a – it now owns, my client now has both interest on 4. So it owns the carparks 4, 3 and 2. It of course –

GLAZEBROOK J:

But it knew that when it bought them.

MR MILES QC:

When it what?

GLAZEBROOK J:

It knew that though, it knew it had a restriction, so…

MR MILES QC:

Oh, there's no problem with the restriction, so long as there was a link with the owner. You see, under the '89 deal my client – who of course didn't have the land then, but its equivalent – could never have more than half because it

always, there always had to be a link between Lot 3 and its half share and the link between Lot 2 and its half share.

GLAZEBROOK J:
Well, you mean a commonality of ownership?

MR MILES QC:
Yes.

GLAZEBROOK J:
Well, that's not in the deed.

MR MILES QC:
No. It recognises commonality. I accept that the deed doesn't make it a condition that this stay in place for ever, but I am coming to that. I mean, once the titles got disestablished it was inevitable that the other half, Lot 2's half, which now had a separate title, would be sold to someone, and that's where the disconnect occurred.

Now I can probably take you quite quickly through the relevant titles, because we'll be saying that the documents that were then part of the background knowledge of any reasonable person wishing to be involved with this land, like a potential purchaser for instance or anyone else wanting to know what encumbrances there are on the land, the key documents that would invariably be searched would be the title and the deposited plan and any documents recorded on the title that have any relevance would be relevant documents because they're all part of the register. And the other group of documents which we say would be relevant would be the relevant council file because that is also effectively a public register available to anyone wishing to search the property.

So, in a nutshell, it's anything shown on the title, any condition shown on the deposited plan and any other relevant documents that one might find on the Council.

So if you look at the title on tab 3, that was issued in March ’88. This is before the titles were amalgamated. So you’ll see Lots 2 –

ELIAS CJ:
Sorry, tab?

MR MILES QC:
Tab 2, Your Honour. Sorry, tab 3. This is really historical interest only. Lot 2, name of Upland and Lakeland. Then that document records over the page a transfer to City Realties on the 27th of January 1989. That’s about four references down from the top of the page, and then right down the bottom land covenant contained in deed. That’s the deed we’re talking about and then cancelled and you’ll see that on 11 December 1989, new titles issue, and the new titles record the amalgamation now of Lot 4 to the two owners of 2 and 3, and that’s tab 4.

You’ll see that was issued in December 1989 and that’s the result of the subdivision going through. You don’t have to worry about the propriety, Your Honour. There have so many proprietors and nothing hangs on it. It’s a company called Amtrust. More importantly, you’ll see the two areas that are now amalgamated, Lot 2 and the one below it a half share in Lot 4.

Now amongst the instruments recorded in the title, you’ll see the third one down subject to section 308(4) and (5) of the Local Government Act, that’s significant and we’ve given you that in our authorities.

ARNOLD J:
Where is that? I see.

MR MILES QC:
Yes, that’s at tab 2 in our authorities about four pages in and you’ll see a reference to section 308. It’s headed plan approved subject to amalgamation and paragraphs 1 to 4 record that, “Where the Council approves a survey plan

subject to any condition, the condition shall be endorsed on the survey plan and the DLR shall not deposit," et cetera, "Until he is satisfied those conditions have been complied with."

Under (3), "Every such condition shall be set out as a certificate authenticate by the Council, signed by the owner, and that will be deemed to be an instrument capable of registration," and 4, "When the conditions referred to subsection (1) have been complied with, the separate parcels of land included in one certificate of title shall not be capable of being disposed of individually, or being held under separate certificates of title, except with the consent of the Council." So specifically 308(4) and (5) have been recorded on the title, noting now that the titles cannot be split without the consent of the Council. So again you've got a clear indication to the world that there will be one owner of Lot 2 and the half share of Lot 4.

Now on that same title, still on tab 4, down the bottom of that page you'll see the deed and the encumbrance are recorded. Lots of easements recorded.

GLAZEBROOK J:
Sorry where's, I can't remember where you see the deed.

MR MILES QC:
At the bottom of that page, the top of the page is 998, the bottom of that do you see, "land covenant in deed."

GLAZEBROOK J:
I see.

MR MILES QC:
And the encumbrance. That's the deed and the encumbrance we're talking about. And then over the page, half way down the instruments you'll see transfer to Central Strata Management on 22 July 2003. Do Your Honours see that?

ELIAS CJ:

Sorry, what page are we at?

MR MILES QC:

Page 999.

ELIAS CJ:

Thank you.

MR MILES QC:

About half way down, and then down the bottom, resolution, under the Resource Management Act, cancelling the amalgamation condition requiring Lot 4 be held in an undivided half share. That's on 26th of May 2005. That's the de-coupling that we're talking about, and as a consequence a new title is issued splitting 4 and 2.

The next tab is the new title issued 26 May 2005 and it's solely Lot 2 in the name of Central Strata Management. There's still a reference half way down to land covenant in deed. So that's still registered on 11.12.1989. And over the page the various –

GLAZEBROOK J:

Is there an encumbrance still on there?

MR MILES QC:

Yes, well you've got the land covenant.

GLAZEBROOK J:

No, I understand that, the encumbrance though?

MR MILES QC:

Oh of course. The encumbrance only affected Lot 4.

GLAZEBROOK J:

Okay.

MR MILES QC:

So it's out of 2. Then –

GLAZEBROOK J:

The idea of this argument before is that you're not entitled just to look at the current certificate of title. You've got to go right back through every certificate of title that had been issued. When you're trying to construe a deed that refers to a particular covenant.

MR MILES QC:

Yes, I think that would be, I think a prudent –

GLAZEBROOK J:

I'm not talking about a prudent person, I'm talking about somebody who, you've got a public register, they go and look at a document on the public register and the current documents that are related to it you say that you have to actually, even though it's on a public register and you take what you get, go back and analyse the history of it including the history of the Council file, and every single iteration of the title in order to decide what this document means that is now attached to the certificate of title.

MR MILES QC:

I think it would depend.

GLAZEBROOK J:

I'm sure it would because it doesn't sound like a particularly attractive proposition to me. And I'm not sure that we really want people – it's like legislative history and intrinsic documents in legislation or contracts. You don't want a whole pile of material that you have to go through that usually might give a gem of something once in every 5000 times you actually have to do it.

MR MILES QC:

Yes, the encumbrance, of course, will remain on Lot 4.

GLAZEBROOK J:

I understand that.

MR MILES QC:

Yes, and if you're interpreting a document, a 1989 document which clearly is significant to the land, then you would go back to what the title was in 1989. You'll find, in fact, that these, that both the deed and the encumbrance continued to be registered, of course, until the de-amalgamation in 2005, and the encumbrance continued after that, and it didn't –

ELIAS CJ:

But it doesn't have any effect, does it?

GLAZEBROOK J:

Well it will do, presumably, because the conditions are still there.

MR MILES QC:

Quite and –

GLAZEBROOK J:

Not commonality of ownership.

MR MILES QC:

Yes and I'm still yet to come to the DP but that's, we're getting close.

ELIAS CJ:

All right, we'll take the morning adjournment then thanks.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.46 AM

MR MILES QC:

Just picking up on that comment by Justice Glazebrook about titles and historical titles and information, the point I should have made is that if there are any current easements, covenants, whatever, in existence the of course

they'll be on the title, and what you will find is that the deed and the encumbrance continues to be on the title because the deed is recording a number of covenants and those covenants restricting the use of Lot 4 are current today, as they were back in 1989. So if you go to tab 8, which deals with –

GLAZEBROOK J:
Yes, although the point I was making, that can't you just look at them on the title, in terms of the title it is as at the moment, rather than going back historically to see what it, how it affected previous titles?

MR MILES QC:
Well…

GLAZEBROOK J:
Because the argument seems to be you needed to look at the very origins of it in the title at the time of the origins rather than just relying on what it now says in terms of the current title.

MR MILES QC:
Yes, but the current title, in all probability, has got all the relevant information, the relevant documents, Your Honour, and it records the fact that it's subject to section 308, indicating that there are conditions there for the Council, it records the fact that there is a deed and an encumbrance, and it refers to the deposited plan. So all of those we would say are extraneous documents which are legitimate to look at to determine what the deed was all about. And if those documents disclose other relevant documents that would have been relevant at the time in construing what the agreement meant, then they would be looked at as well.

ELIAS CJ:
But you only go to those extraneous documents if the deed doesn't make sense in itself, that's your argument isn't it?

MR MILES QC:

Well…

GLAZEBROOK J:

Well, no, because your relying on the extraneous documents for your interpretation.

MR MILES QC:

Well, if I had to, Your Honour, I would have run an argument that the deed with no other document would be enough because of the recitals. But I'm in the fortunate position of having a significant number of other documents which must be relevant because they are referred to on the title, and they help to explain the context of the deed and why this crucial condition which triggered the deed but isn't referred to in the deed itself, because it's referred to in the more appropriate documents which were part of the background to that document. So I am –

ELIAS CJ:

Well, I'm just wondering whether though your argument is that the recital incorporates those documents by reference? I wonder whether it is really an extraneous documents argument.

MR MILES QC:

Well, that is certainly open to interpretation, Your Honour, because – and which is why I said if I'd had to I'd have run the same argument, but based just on the deed and the encumbrance.

ELIAS CJ:

Yes.

MR MILES QC:

But fortunately there's all the other information – well, I keep repeating myself, and I'll come to two or three of those documents now. But just so that Your Honours understand, you know, what the current position on the titles

are, you've got tab 8 that has got Lots 3 and 4, they're still of course on the same title because they didn't de-merge, they're still there, and if you go to the second at the top, it's page 920, on the right-hand column down the bottom you've got the deed and the encumbrance still recorded, and over the page on 921, two-thirds of the way down, you've got the transfer to Escrow Holdings in 1990, so that's the current position. And then the next page is the same title, it's 70A/978, and it's just been updated.

Now, Your Honours, could I turn to the next page, the next tab, which is tab 10, because we're now getting into the subdivision –

GLAZEBROOK J:
Where's the other half share of Lot 4, have we got that somewhere?

MR MILES QC:
On tab 9, Your Honour.

GLAZEBROOK J:
That's the one attached to Lot 3.

MR MILES QC:
You've got 3, and do you see part Lot 4 underneath it?

GLAZEBROOK J:
That's the half share.

MR MILES QC:
Yes.

GLAZEBROOK J:
So where's the Lot 2 half share? Is that the one before, is it?

MR MILES QC:
That's, if you go to – yes, tab 6 is the new –

O'REGAN J:

This is the half share separated from Lot 2.

MR MILES QC:

Yes.

GLAZEBROOK J:

Right. I don't think we went to that, did we?

MR MILES QC:

Yes.

GLAZEBROOK J:

And that's where the encumbrance is.

MR MILES QC:

Yes.

GLAZEBROOK J:

So whereabouts is the encumbrance on that?

MR MILES QC:

On that page, on page 206?

GLAZEBROOK J:

Yes.

MR MILES QC:

In tab…

GLAZEBROOK J:

Oh, I see, right.

MR MILES QC:

You see half way down?

GLAZEBROOK J:
That's all right, thank you. I don't think we went to tab 6 before.

MR MILES QC:
Yes.

Well, now, if we come then to the subdivisions, there were two subdivisons, tab 10 records the first, which you'll see the date is 1987, and Lot 1 originally was the whole of the land at 17 Hargreaves Street, and it was now subdivided into three lots. So you've got Lot 3 there, Lot 2 and Lot 1, and Lot 1 is the lot that was subsequently subdivided, and I'll come to that in a minute. But the relevance of this is we've now got the three lots, you've got Lot 3 and Lot 2, you'll see that Lot 3 runs down to the bottom, as it were, running beside Lot 1, but stops at the bottom of Lot 1, and you'll see it doesn't have any access to Hargreaves Street, you'll see right at the bottom a reference to Hargreaves Street, because Lots 3, 2 and 1 don't have access there. They all rely on that right of way which goes down through Lot 44 in the one shown by the photo. So access was crucial down to Hargreaves Street as well as the parking issue.

So if you go over the page to the next tab. This is the key subdivision and the deposited plan that was finally lodged and this is DP121257 and it now shows Lots 3 and 2, the same lots as before, but Lot 1 is now divided into Lot 5 and Lot 4, and Lot 5 is owned quite separately. Lot 4 is the lot we're talking about.

If it helps Your Honours I've tried to blow that up. If you have a look at the next page under tab 12 you'll see we've blown up Lot 4 and it's a bit easier to follow the various rights of way and there, but if we just stay with this deposited plan. I'm sorry, the deposited plan is DP126975 and you'll see it's approved as a survey on the 13th of October '88, and on the top right-hand column you will see the reference to approvals.

Now if Your Honours, as I tend to do, find it a little difficult to read the writing on it, we've set it out in my submissions here. It's at paragraph 144 of my

submissions and we've set out there the resolution and the condition and it reads as such. "Pursuant to a resolution of the Auckland City Council passed on the 11th of August 1988 approving pursuant to section 305 of the Local Government Act, this survey plan, conditional upon the granting or reserving of the easements shown in the memorandum endorsed hereon, re-imposing the easement conditions," et cetera, "Excluding a parking easement," and none of that's relevant to what we're talking about, "And subject to the conditions of amalgamation set out here on." That's the key phrase, "And certifying to survey plans in accordance with the relevant requirements."

And it then sets out the amalgamation condition, and it reads, "The amalgamation condition that Lot 4 hereon be held as to two undivided one-half shares by the owners of Lots 2 and 3 as tenants in common in the said shares and that individual certificates of title be issued in accordance." So that's the condition that I've been referring to, and that makes it clear that the subdivision was conditional on that requirement, that there be commonality of ownership between 2 and 3 and 4.

And just while we're here, if you see the memorandum of easements, and it's a bit hard to follow, Your Honours, but you will see that the dominant owner of a number of those easements is Lot 5 and, of course, the reason Lot 5 – and you'll see it has easements over Lot 4 and you've got a right of way. You've got three rights of way over Lot 4 and the reason for that is that it couldn't get out without an easement over Lot 4. And the key easement down to Hargreaves Street is easement N, that's that driveway, and N is the fourth easement I that schedule and Lots 4, 5 and 2. I think there's a 3 in there, I think. So you've got Lots 2, 3, 4 and 5 all have the right to go down that driveway through Lot 44 and onto Hargreaves Street.

The point I'm making there, Your Honour, is that there is an elaborate series of easements all designed to ensure that the owners of the various lots have the right, have the rights they have. Nowhere is there an easement or a covenant, but it would have to be an easement, indicating a right of way over,

in favour of Lots 2 and 3 over 4, and the reason, of course, is because they owned it. It wasn't necessary. So totally consistent with amalgamation and amalgamation quite specifically referred to and set out as the condition on granting the consent.

Now if I could then take you, on the basis that these are relevant extraneous documents, and again Your Honours I would say that any – I'm sorry, there's one more significant reference on that deposited plan. If you go to the amalgamation condition, and if you go under that you'll see, see file, A627416, and it's a Council file. So again a potential purchaser, someone interested in this property, would search the title, would examine the deposited plan, would read the conditions, would note that there is a Council file, and that again is notice of extraneous documents that might be helpful in construing what the deed referred to.

If you go then to the Council file, which is the next two tabs, you'll see the first one, page 1029, is a decision by the planning subcommittee of the Council dated 16 April 1988 and at 1030 you'll see the report. At page 1030 you go onto the first paragraph, you've got the address. At the bottom, under paragraph 2, you'll see the reason for the application. It's necessary because the applicant proposed to locate a percentage of required car parking for two office buildings on an adjacent site.

There's some history under 3, then 4 is the proposed change. It is proposed to create a new Lot 4 on land which was part of Lot 1… concurrent with the creation of this new lot a right-of-way will be registered on the title of a vacant site on Hargreaves Street to give access from the back of Lots 1 to 4 to Hargreaves Street." That's the right of way I keep talking about, but it's important because the Council recognised that that was a significant access issue.

Then over the page, this is on page 3, you see the first significant paragraph. "It is proposed that Lot 4 will be jointly owned by the owners of Lots 2 and 3. This will create a title that will carry most of the easements." Under 5.1,

"This dispensation would encourage the better development of the site because the creation of the new Lot 4 will allow joint ownership by the owners of Lots 2 and 3. Lot 4 will be used for car parking for 2 and 3. The creation of a new lot is acceptable subject to a condition that there is restriction preventing it from being used other than carparking, it being owned by other than the owners of 2 and 3." That just couldn't be clearer. "Recommendation, that consent be granted," and then underneath that, "The proposed Lot 4 have registered on its title a restriction to the satisfaction of the city solicitor, it being prevented from being used for other than carparking and accessways," the accessways of course are not to Lot 4, the accessways are to Hargreaves Street. And (b), over the page, "Lot 4 being owned by other than the owners of Lots 2 and 3," so it's a absolutely specific condition.

Then at 14, this is the final approval, you'll see under the report scheme, half way down under A, "Lot 4, which will contain a low-level parking building and carparking space for Lots 2 and 3, the owners of which it is proposed will jointly own Lot 4. The DLR has agreed to the amalgamation clause. Planning approval requires an encumbrance be registered. Lot 4 has no road frontage but will not need an exemption pursuant to section 321(3)(c), as it will amalgamate with Lots 2 and 3, which have road frontage," and then more details, B, under Lot 5, including you'll see in that last paragraph under B, the last two lines, "Right of way N gives additional access from the sites to Hargreaves Street."

And then over the page, just standard resolutions, but 2.3, "That common access and parking Lot 4 hereon beheld as to two undivided one half shares by the owners of Lots 2 and 3 as tenants in common in the said shares and that individual certificates of title be issued in accordance therewith, CA627416," that's that Council reference which was specifically noted on the deposited plan. So that's the – what I've set out there, Your Honours, is the relevant information that anyone would, looking at the land, interested in the land, would consider to be relevant background material. All of this is notice to the world either in the Land Transfer Office and the titles and deposited

plan, or what I would regard as another register, being the Council, documents open to the public and available.

GLAZEBROOK J:
Is this envisaged not in the actual conditions but I think in the encumbrance, that the Council can give consent to dispense with the conditions and did so?

MR MILES QC:
Yes.

GLAZEBROOK J:
So it must have been in contemplation, even at the beginning, that the Council could consent to decoupling. What do you say about that?

MR MILES QC:
I wouldn't take that, I wouldn't go anywhere near that far, Your Honour. I would say that that is just a standard condition. It's always, the Council has imposed a condition, it's always open to the Council to remove it, and that's just a recognition that it could happen. I don't think for one moment the parties contemplated that something as fundamental as this would ever take place. And why should they?

ELIAS CJ:
What other conditions? Sorry, I'm just trying to remember what other conditions were imposed?

MR MILES QC:
It was just –

GLAZEBROOK J:
Well, they had to be used for carparking –

MR MILES QC:
And access –

GLAZEBROOK J:

– and amalgamation.

MR MILES QC:

– access to Hargreaves Street.

GLAZEBROOK J:

Well, they didn't, I don't think they said…

MR MILES QC:

They didn't record that condition on the deposited plan, but they refer to –

GLAZEBROOK J:

That was one of the reasons, yes.

MR MILES QC:

And they do refer to access in the deed and the, I think in the encumbrance.

ELIAS CJ:

So there's only three?

MR MILES QC:

It was really only two, I think Your Honour, two primary ones – oh, no, three: parking, access and amalgamation, yes.

ELIAS CJ:

Well, do you say the same about all of those conditions that it can't have been contemplated by the parties, that the Council would exercise the power reserved to it to remove those conditions?

MR MILES QC:

Quite. And the reason why the parties wouldn't have reasonably contemplated that is that it would have immediately made it impossible for Lots 2 and 3 to cross into the carpark or go down the right of way.

GLAZEBROOK J:
But that's assuming that your interpretation that they don't have that through the covenant is correct, isn't it? So it's a rather circular argument.

MR MILES QC:
But the right argument, Your Honour. But of course, yes. And Justice Peters for those reasons agreed.

Now I'm conscious of time. What we have done in the written submissions, Your Honour, has really just covered the points that I've been making, that covers it really for the paragraphs, up into paragraph 74. Let me just – we then deal with the distinction between covenant and easement, and I'll come back to that. If we, at paragraphs 109 and onwards, where we talk about the error we say the Court of Appeal made when they considered that the, our version of the deed was absurd, and the only reason it was absurd was because of a change of circumstances 16 years later and why that's totally inappropriate, we refer of course to *Zurich,* we've really only – the relevant paragraphs in *Zurich* from the majority judgment delivered by Justice Arnold, and they really start at paragraph 60 and move through to paragraphs 80-odd, where Your Honour talks about absurdity.

Maybe if I just go quickly to *Zurich*, though I'm conscious that Your Honours will be well aware of it. But it's tab 9 in my bundle of authorities. Your Honours' judgment on this issue starts at paragraph 60. At 62 you note that there might be a more restrictive approach where third parties are involved, and I don't disagree with that. Then you discuss, yes, you get onto commercial absurdity at 88 where you say, "Where contractual language interpreted in the context of the contract as a whole has an natural and ordinary meaning the Courts will generally give effect to that as they don't easily accept that people have made linguistic mistakes, particularly in formal documents. The primary source of understanding with the parties means the language interpreted in accordance with conventional usage," a strong case to persuade something's gone wrong. 89, "If consideration of the relevant background forces a Court to the conclusion something has gone wrong with

the contractual language it is not required to attribute to the parties an intention they couldn't have had. Just as the Courts have accepted that understanding the commercial purpose of a commercial contract is relevant to its interpretation, so have they accepted that if a particular interpretation produces a commercially absurd result then you might read it differently." You caution absurdity at 90, and obviously concerned about hindsight, and you conclude at 93, "All this means that where contractual language, viewed in the context of the whole contract, has a ordinary and natural meaning, a conclusion that it produced a commercial absurd result should be reached only in the most obvious and extreme cases," to which I respectfully say yes, and –

GLAZEBROOK J:

What's been put here in terms of the Court of Appeal was saying there's an ordinary and natural language where the negative language actually means positive, leaving aside for a moment whether a covenant can grant a right of access. And the other interpretation, which is also open on the language could create an absurd result, it's different from what's being talked about here. What's being talked about here is the language can only mean X, it can't possibly have the Y meaning, and the Court concludes that something has gone wrong with the meaning and rewrites the contract, which is a totally different situation than saying, "Well, we've got two possible interpretations, one of them creates an absurdity, the other one doesn't, therefore that is the most natural meaning, the one that doesn't create the absurdity." It's different reasoning, isn't it?

MR MILES QC:

Yes, it is, slightly, and I take that point, and I would agree that that's perfectly legitimate if you had two legitimate constructions. The problem here, and I think what has happened, is that seduced by my friend's argument that an absurd result has been reached, albeit 16 years later, they've then gone back and re-analysed the deed to conform with a deal that they say would have solved the problem, and that's unacceptable. If you analysed the meaning as at 1989, as you're bound to do, using all of the relevant documents in

existence at the time, there can be no other legitimate construction that it is a restrictive covenant, it was always intended to be a restrictive covenant, it is registered as a restrictive covenant –

WILLIAM YOUNG J:
Why do you say that?

MR MILES QC:
Sorry?

WILLIAM YOUNG J:
Why do you say it's registered as a restrictive covenant?

MR MILES QC:
Because it's noted under 126.

WILLIAM YOUNG J:
Under 126A isn't it?

MR MILES QC:
Yes.

GLAZEBROOK J:
Which could be either.

WILLIAM YOUNG J:
But that could be positive or negative.

MR MILES QC:
Yes, absolutely, Your Honour. But –

WILLIAM YOUNG J:
So why do you say it's registered or noted as a restrictive covenant?

MR MILES QC:

Oh, I'm sorry. It's notified as a covenant.

WILLIAM YOUNG J:

Yes.

MR MILES QC:

And it doesn't matter – well, I mean, this comes back to that discussion I had with Your Honour on whether a positive covenant can effectively reproduce the rights traditionally recorded in easements, and if it could then I would understand the argument.

WILLIAM YOUNG J:

Is there any authority to the contrary? Is there any authority referable to the regime we now have where positive covenants can be registered, that says that a positive covenant cannot encompass rights of access?

MR MILES QC:

I am confident that you will not find such a covenant, and I am confident you will not find an authority that says that a covenant can amount to giving access from a neighbour, other than – yes, as a covenant. That's reserved to easements.

ELIAS CJ:

Does it matter if it has that effect though, in its terms?

MR MILES QC:

Oh, it matters hugely, Your Honour.

ELIAS CJ:

Yes, but why?

MR MILES QC:

Because if the Court of Appeal had recognised that this was a covenant they would never have actually morphed into the error that the covenant can

effectively incorporate a characteristic that has always been regarded as crucially linked with easements. If they had construed it –

ELIAS CJ:

Why does it matter though in law, whether it's an easement or a covenant, particularly since we have a statutory system of registration of covenants?

MR MILES QC:

Because our statutes and our common law for – Professor Thomas would know more than me – but I would say for a hundred years, has recognised that easements are restricted to giving rights to move onto your neighbour's land or to utilise your neighbour's land, that's what an easement does. So conveyancers understand that and they are drawn accordingly, so you know what you have –

ELIAS CJ:

But why can't a covenant achieve that effect?

MR MILES QC:

Because the definition of a covenant is found, it's in the Property Law Act, and the definition does not permit either an action by the owner of the land to permit someone to come in, it's all dealing with the conduct of and restrictions or actions by the owner of the land in respect of his or her's own land.

GLAZEBROOK J:

So a covenant that's said, "They can come on my land and park," would actually either not be able to be registered or if it had been registered would be removed from the register?

MR MILES QC:

Correct. Because in substance it's an easement.

ARNOLD J:

So if you look –

GLAZEBROOK J:

Well, why wouldn't they turn it into an easement if that was the case?

MR MILES QC:

Well, then we'd all understand – you'd then examine the terms of the covenant and it would say, "You have access to my land," but it doesn't say that.

GLAZEBROOK J:

Well, no, you've just told me it can't say that and be a covenant. Would it then be an easement and has been wrongly noted as a covenant, it should have been an easement, or what would happen?

MR MILES QC:

No, because they never intended it.

GLAZEBROOK J:

Well, no, but I'm postulating – well, to be honest, the wording sounds to me like, "You can come on my land and park on it." So assuming the wording does say that, so I'm postulating a system where it actually, instead of saying it by the back door said it absolutely up-front, what do you say the result is? So it's noted as a covenant and it says, "You can come on my land and park on it."

MR MILES QC:

Well, I'm fairly confident that a conveyancing solicitor simply wouldn't understand it to read that way.

GLAZEBROOK J:

No, well, it does, and it absolutely it says, "You can come on my land and park on it." I don't know how conveyancing solicitors read English like everybody else, so it says that.

MR MILES QC:

I think they would see that as an easement.

GLAZEBROOK J:

So they wouldn't have noted it as a covenant –

MR MILES QC:

No.

GLAZEBROOK J:

– they wouldn't call it a covenant. But say they did, what happens, it becomes an easement or it should have been registered as an easement or what?

MR MILES QC:

Well, in that case it should have been registered as an easement and it wasn't, it was noted as a covenant. I imagine it'd be unenforceable. It's just a –

ELIAS CJ:

What's the policy of the law?

MR MILES QC:

Right. That's what we, we deal with that at the end of the submissions. The policy for 150 years, ever since is it *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143 (Ch), is that the law will not recognise new interests in land unless the statute, unless Parliament says so. So it's too important. It's too important for all of us to have this issue determined by Judges, it's –

ELIAS CJ:

Well, what's the purpose of permitting registration of covenants?

MR MILES QC:

Notification to the world.

ELIAS CJ:

And what's the purpose of notification to the world?

MR MILES QC:

They know when they buy the land –

ELIAS CJ:

That it's subject to a covenant.

MR MILES QC:

– it's subject to a covenant.

ELIAS CJ:

But you say an unenforceable – oh, no, you say the covenant in its terms.

MR MILES QC:

Oh, no, that's only one of Justice Glazebrook's hybrids –

ELIAS CJ:

Yes, I see.

MR MILES QC:

– that would be unenforceable.

ELIAS CJ:

Yes.

MR MILES QC:

And –

GLAZEBROOK J:

But what would the policy behind that be, that if you happened to call it a covenant rather than an easement and happened to note it rather than registering it, still notice to the world but it would be unenforceable? Because it certainly wouldn't be unenforceable between the parties.

MR MILES QC:

No, it wouldn't, absolutely, accept that. I think it probably be unenforceable to a third party. The reason why I suggest, Your Honours, that you don't need to get into the position of the enforceability or otherwise of such a hybrid, is that the parties – and I'm thinking of the titles – are strewn with very specific easements and covenants. The parties knew precisely what they were doing, the Council knew precisely what it was doing. It was instructing the office solicitor to lodge a document which was a restrictive covenant, and everything that took place was consistent with that, including the wording of the deed.

WILLIAM YOUNG J:

You're entitled to say that if the parties were setting out to create rights of access conveyancing practice would have suggested that easements be prepared. I think it's when you go beyond that and say that if they did intend to, if notwithstanding that they did nonetheless intend to create rights of access, that they really failed because they used the wrong form.

MR MILES QC:

Screw it up because of the – well…

GLAZEBROOK J:

Although they, you were saying earlier they couldn't grant easements to themselves in terms of their own half-share, it would have to have been cross-easements –

MR MILES QC:

Yes.

GLAZEBROOK J:

– which isn't overly useful if you then sell off the portion that you own, is it?

MR MILES QC:

Quite. Although if, I mean if there were –

GLAZEBROOK J:
So you couldn't in fact have an easement that dealt with this situation in this particular case, it would only have been a cross-easement that didn't deal with your half.

MR MILES QC:
Oh, quite, quite, yes. The only reason I pause, Your Honour, is because I think you could do it by cross-easements. But what a clumsy way of dealing it, when you've got common ownership. Because the also of course –

GLAZEBROOK J:
Well, but it still doesn't deal, even a cross-easement doesn't deal with you selling off your half share, does it?

MR MILES QC:
Correct, yes. And it doesn't deal, you'd have to have further cross – no, I suppose…

GLAZEBROOK J:
Something, yes, I don't know.

MR MILES QC:
You'd need another easement, I suppose, to get you down to Hargreaves Street as well. But yes, of course, you'd need that anyway.

So I suppose just in summary, we say that the relevant documents from the Council indicate clearly what the deal was, and that the deal required logically the commonality of ownership and that they saw that as being sufficiently important to require that as a condition to be registered on the deposited plan, and that's remained the position ever since. The document that was filed, the deed and the encumbrance, is consistent with a restrictive covenant. It was noted under 126 as a covenant and not as an easement, there is nothing inconsistent in the wording or the formal actions of any of the parties, it's all consistent with the proposition I am advancing. You cannot, with all due

respect to Your Honours, read the deed and see that deed as saying, and keeping in mind the recitals, C being of course the crucial recital, dealing with good management, there is nothing in that deed that indicates that, “And by the way you have access to my property,” it is silent on that point, and it’s silent deliberately because it wasn’t needed.

Now on the, just mentioning the absurdity argument, just my last point on that, tab 10 of my authorities is that recent judgment in the Supreme Court in England, *Arnold v Britton & Ors* [2015] UKSC 36 (English SC), and there’s a detailed discussion there of construction of documents and commercial common sense, et cetera, and the relevant parts of His Lordship’s judgment starts at paragraph 17 and concludes at 21, and I think it’s 19, I think, that's probably the most relevant. “The third point, I should mention, is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its language, has worked out badly or even disastrously for one of the parties, isn’t a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties or by reasonable people in the position at the date the contract was made,” that seems entirely orthodox to me. And fourthly, “While commercial common sense is a very important factor, a court should be very slow to reject the natural meaning of a provision as correct because it appears to be an imprudent term.” And 21, the fifth point, “Concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made or available to both parties,” and so on. And His Lordship’s view is when interpreting a contractual provision you can’t take into account a fact or circumstances known to only one of the parties.

Now we deal with all of those propositions, Your Honours, from about paragraphs 109 through to 130, where we do get into that issue of *Opua Ferries Ltd v Fullers Bay of Islands* [2003] 3 NZLR 741 (PC), *Cherry Tree* and *Westfield.* My argument of course is you don’t need today to determine the limits of what documents or information you would take into act, but what you

do need I would say is to determine that at the very least a reasonable person would, interested in the land, would consider that part of the background knowledge that would be relevant would be knowledge available to anyone who searched the register and anyone who searched the Council files. So to the extent that we move into those categories, it's possible that you would say that that's something *Westfield* go so far. *Westfield,* I am sure, would go so far as to say any documents available on the register would be relevant. What *Westfield* ultimately was not prepared to do was to take into account knowledge or certain circumstances that the original owners had. There was a lot of evidence in *Westfield* dealing with intention of the original parties. There was even a suggestion of an oral understanding between the original parties that obviously had some relevance to the use of the easement. And the Court said none of that is appropriate because third parties would not have knowledge of it. You are entitled to take into account of course the land, and the rationale I think for that must be, well, that's permanent, so anybody wanting to buy the place will go and have a look at it. So the nature of the building, the nature of the environment, all of that to the extent it's relevant much be within the level of knowledge, of background knowledge that a third party would have.

For what it's worth, Your Honours, my view on the dissenting judgment of Lady Justice Arden is particularly interesting, because she poses five or six reasons why she doesn't go along with the majority. Keep in mind, Your Honour, that the party saying – Landmain I think it was, who borrowed the money – saying, "We don't want this off-register document to be part of the deal, working out what the party was." What is so cynical is of course they knew about it because they were the, they borrowed the money, and through accident their charging provision was left off. *Cherry Tree* I think were the company that bought the land that, when the lenders immediately on-sold it. So you have a position where the third party, Cherry Tree, is actually wanting the extraneous document, the off-register agreement, to be relied on, and the majority said no. Recognising the unfairness of it and obviously pushing for a rectification argument, putting that aside, you had the odd proposition to me that an original party who was aware of the off-register document was saying

to the Court, “That shouldn't be part of the process of construing what the document, public document, meant.”

Lady Justice Arden really I think had two answers to that which seemed quite attractive to me. And if I just take you to the judgment, which is at tab 8 in my bundle, and if you go to paragraph 23 she says, “Some extrinsic material will be known or capable of being known to third parties. For example, publicly known facts about the existence of some statutory right or the physical features of the land. What’s in issue in this case is whether the Court should exclude party-specific extrinsic material.” Now, she goes on to say – and I’m just taking Your Honours to the crucial paragraphs – at 30, “Various decisions of the Court demonstrate that the conclusiveness of the register is qualified. In the *Scottish & Newcastle Place v Lancashire Mortgage Corporation Limited* [2007] EWCA Civ 684, the Court held a mortgagee was estopped, as a result of communications that didn’t appear on the register, from asserting that a charge had priority, even though its charge had been registered on the register first. The charge had a different priority.” Now that's an interesting proposition, and it could be utilised where the position is that one party had knowledge of what the actual deal was originally intended, because of some off-register document or understanding, but nevertheless was relying on the register as it appeared. Now that cannot be right. You know, from a purist point of view of assessing what documents in the big picture, what extraneous documents ought to be utilised, and the majority decision said, well, nothing other than what was known to all the parties at the time or public information,” like what the land looks like, even though one party was taking advantage of that. The way through that would be an estoppel or – and this also interests me – her conclusion at paragraph 36, which strikes me as being an attractive proposition. Her Ladyship said, “For the reasons given in paras,” et cetera, “I conclude that registration at the land registry doesn’t prevent the Court from using extrinsic material as an aide to interpretation of the charge, provided that the Court can be satisfied that the interpretation involved wouldn’t prejudicially affect the rights of third party. The charge is not to be treated as addressed to third parties simply because a third party might have inspected the register. Only third parties to a subsequent disposition are likely to be

prejudicially affected." So she's saying, "Is a third party in fact prejudiced? Otherwise she would understand with the majority that knowledge, facts, documents known only to one party can't be used as an aid to construction of a contract, and she sets out why that view is the basis of that view.

Now here there are at least two Court of Appeal judgments, and I think Justice O'Regan, Your Honour, was involved in one, *Thompson v Battersby* (2007) NZCPR 673 (HC), whether you remember it or not I – it was a covenant out in the, restricting a building because of cliff faces and possible instability argument, and the owner wanted to produce a, I don't know, a wall or, not a building anyway, and the issue was did the covenant, would that amount to a building in terms of this. Now in the High Court the Court had no issue in actually going to the Council file, which included a report from Tonkin & Taylor, and Tonkin & Taylor made it clear that the covenant that they were talking was designed for instability of the area and hence it wouldn't cover, logically it wouldn't have been intended that the covenant would have been wide enough to stop any sort of building at all, you know, including just a wall. And while Your Honours in the Court of Appeal didn't get into sort of big ticket discussion on length, on the extent to which extraneous evidence can be used, you had no difficulty in accepting that a local body file, which I continue to call a full register, is appropriate, and the LIM reports, which of course are just de rigueur these days, no one goes, would dream of buying land, building or anything else, without a LIM report, which is nothing more than just a summary of the Council file, and I think the LIM report in the *Thompson* case specifically referred to the Tonkin & Taylor report. Now I've in my authorities have put the High Court judgment, because it's the High Court judgment that actually explains that – it's tab 5, yes, it's Justice Courtney. The reason I put that judgment in rather than the Court of Appeal is that the Court of Appeal judgment basically just analysed the meaning of building and simply discussed the facts as it were. Justice Courtney said, "I'm adopting the standard ICS principles and I consider as part of that I'm entitled to look at the Council file and Tonkin & Taylor."

There's an earlier judgment which Justice Young was involved in, the *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZ ConvC 193, 938 and *Causer* appeal, that's in 2004, I don't know whether Your Honour remembers that…

WILLIAM YOUNG J:
Vaguely, about a spring.

MR MILES QC:
Yes. And that was a water easement. The issue is what did it cover. And it's clear from the Court of Appeal judgment that the Court was prepared to look at the land, at the previous history, and generally the sorts of factor that you would take into account on standard ICS principles. And I think Your Honour Justice Young referred to *Ohinetahi* in the *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 402 (CA) case where Your Honour of course posed some concerns about the consequences of following *Westfield,* and I understand those concerns. I wonder whether the approach by Lady Justice Arden mightn't answer some of those concerns. But I don't think Your Honours need to get into a significant extension of where the Courts have been prepared to go so far because the documents we say are within that sort of penumbra of categories which any reasonable buyer would immediately consider to be relevant. I can give Your Honours the *Ohinetahi* judgment, we can give you those at lunchtime if that would be helpful.

All of this has been dealt with in – oh, *Opua Ferries* is again consistent, I think, with the proposition that so long as there's a public register, then that must be a category that would be taken into account, and the schedule of savings, which was part of the register, which the, there was disagreement running right through the Court system but ultimately the Privy Council saying that is the sort of the ultimate document and by a somewhat sophisticated analysis of timings, came to the conclusion that a reasonable person reading that would have construed two theories, but that's by the by what the facts are, but it's consistent with the proposition that at least public registers must be part of the deal.

Now one issue which I haven't referred to in our submissions was the easements, the covenants and easements, and again I've discussed that perhaps in some detail with Your Honours as the argument has developed, but you will find our written submissions starting at paragraph 75. We say there at 76, that's the section 126A issue, that only covenants can be notified. Then the definition of "positive covenant". The covenantor undertakes to do something in relation to the covenantor's land. It would beneficially affect the value of the covenantee's land, or the enjoyment of that land by any person occupying it. And a restrictive covenant is just the negative to that, but that's now been codified under section 4 and we've given you that, but it undertakes to refrain from doing something on the covenantor's land that, if done, would detrimentally affect. We say at 79 they intended the covenants to be capable of notification clearly.

At 83 we say, "The granting of binding rights to another to do something in relation to one's own land is the separate and distinct domain of a positive easement." And then at 85 we give the Hinde, McMorland definition, "A positive easement is essentially the right to use the land of another person in a particular way without any right to occupation…or to take any part of the soil," et cetera. "A negative easement is a right which does prevent a land-owner from using his or her land in a particular way." So a positive easement, Your Honour, being the right to use someone else's land in a particular way, is exactly the sort of easement which, or the sort of activity which would properly have been registered as an easement in this case, because it quite specifically would be to allow the neighbour, Lots 2 and 3, to come onto the owner of Lot 4 and that's what we say at 87. It's entirely possible to create an easement. They just didn't because it was unnecessary and didn't require it.

We say at 91 that the judgment –

O'REGAN J:
So it would have been possible to give an easement over their own land?

MR MILES QC:

No, well, I don't think they could do that then and the way to have done it, I think, would been to have cross easements, so that Lot 2 –

O'REGAN J:

But would that make things any better now?

MR MILES QC:

No.

O'REGAN J:

So really this problem, there's no way they could have dealt – if they'd foreseen this difficulty, there's no way they could have dealt with it, is that what you're saying?

MR MILES QC:

I'm sorry. Cross easements could have done it because they would be registered and they'd be binding, and on any subsequent purchasers.

ELIAS CJ:

I understood your argument to be that the form of the obligations undertaken under the deed didn't give a right to come onto the property –

MR MILES QC:

Correct.

ELIAS CJ:

If there had been a covenant in the deed as to use by the other lot, why – do you still say that that would not have been able to be achieved through the deed mechanism and that it had to be an easement?

MR MILES QC:

Correct.

ELIAS CJ:

I find that hard to follow really, because if they had expressed it as an obligation, if it was notified, if, as you say, it's quite complicated. If it is your own land you'd have to set up these cross easement purposes. I don't see why –

MR MILES QC:

Hang on. I'm sorry, it's not a bit complicated. It's not a bit complicated because of the ownership. It was supremely simple, 2 and 3 own 4. They didn't need an easement. They didn't need anything. They had –

ELIAS CJ:

No. I'm just asking you if they had wanted to make the deed entire and not rely on the amalgamation condition, if they had wanted to use belt and braces in that way, do you say they couldn't have expressed it in a way that was effective in the deed, because I had thought that one of your arguments is that the form of the obligation doesn't give a right to come onto the land?

MR MILES QC:

Correct. Only a covenant does that.

ELIAS CJ:

In the form. Only an easement.

MR MILES QC:

Only an easement.

ELIAS CJ:

Well, no, leave aside the easement.

MR MILES QC:

Yes.

ELIAS CJ:

I thought you were saying that and in any event the obligations undertaken here don't give that right, but if they had have given that right would it really matter that it was in a deed rather than in an easement?

MR MILES QC:

I think it would just have been regarded as a total surplus issue because they had the right anyway. Why would you bother?

ELIAS CJ:

Well, because of the sort of problem that's arisen here.

WILLIAM YOUNG J:

Yes. People sometimes wear a belt as well as braces.

ELIAS CJ:

Yes.

MR MILES QC:

Well they did up to a point. The first two recitals recorded the ownership structure and the third recital followed perfectly logically from that. We own this land between us. We'll just work out how best to divide it up.

WILLIAM YOUNG J:

If you look at the plan that's attached to the deed it does seem to allocate carparks to the two lots?

MR MILES QC:

Yes.

WILLIAM YOUNG J:

Might it be implicit in that, just in the handwriting, that Lot 2 has access to the carparks identified?

MR MILES QC:

Sorry, Your Honour, I…

WILLIAM YOUNG J:

Well, might it not be – I mean just the handwriting. I mean if these are lots that are, as it were, dedicated to Lot 2, might it not follow or be implicit in that, that the owners of Lot 2 have a right to access those carparks?

MR MILES QC:

But they do anyway.

WILLIAM YOUNG J:

No, but without this document they wouldn't because the other people might be parking in them.

MR MILES QC:

Well, they could still go on there. I mean if there's wall to wall cars that doesn't stop their right. There's just a practical issue.

WILLIAM YOUNG J:

Well, it might be quite a big practical issue if they can't use them. The Lot 3 owners get up earlier in the morning.

MR MILES QC:

I don't know.

ELIAS CJ:

But the covenants in their own terms are concerned with use and, as Justice Young says, there's this plan to indicate what they meant by use.

MR MILES QC:

Yes, well –

ELIAS CJ:

But you are really driven to the black and white position, it seems to me, that you cannot have an obligation like this except via an easement.

MR MILES QC:

No, it's – you missed the first premise, Your Honour. The reason why it's black and white is not because of what you can or can't do with covenants or easements, it's just simply ownership. That's the black and white issue. You can do what you like on your own land but, by the way, because we're businessmen, I'll agree to only use a bit of my land. That's all it is.

And the deed never suggests otherwise because it didn't ever have to and that's why the Council was so adamant that there had to be the commonality of ownership, and it recognised that the only way that two and three could actually get down through Hargreaves is by running over that triangle of Lot 4, and the reason they never granted an easement is they didn't have to. They granted them an easement on the right of way running through Lot 44 because that was owned by a different proprietor. They never bothered to give them an easement over that triangle because they owned it.

And that underpins the second of the Council's concerns that access to Hargreaves Street was a condition.

ELIAS CJ:

Does that complete what you wanted to address us on Mr Miles?

MR MILES QC:

Could I just in the three minutes –

ELIAS CJ:

Yes.

MR MILES QC:

Could I just, at least, take you to the paragraphs at 99 and onwards where they talk about the common law disapproving of new property concepts, and it starts with Lord Brougham and in *Hill v Tupper* (1863) 2 H&C 121. They then get onto the issue of numerous clauses which simply says it's not up to landowners to reformulate rights. The way through this, if there has to be a new right, is for Parliament to legislate because it's too important otherwise.

And we've given you the – there's a substantial article that we've given in our authorities from Professor Edgeworth in Australia and we've given you the references to that, and we set out why the policy is significant.

Just as a – well, it's not going to determine the appeal but it interested me that the negative easements, and there are a certain category of negative easements. You won't interfere with the light of your neighbours, but there are one or two other examples. That those we see as categories, I'm advised by Professor Thomas that there are no, there have not been any new categories since, I don't know, what is it, 1840 or something like that. I think Hinde and McMorland talks about this and the reason for that is they prefer negative easements to be defined by negative covenants and the reason for that, I think, is that a negative easement and a negative covenant again is essentially conduct by the servient tenant on his land and hence more appropriate when framed as a covenant. But it just drives home, once again though, the concern by the Courts, and I think by Parliament, that interests in land have to be defined as clearly as possible, because so much depends on them, and that the definitions, and the understanding of lawyers for generations as to what is a covenant, what can be covered by a covenant, and what is appropriate for an easement, is a very significant element in that area of the law. I don't think there's any doubt that the instrument defined by the Court of Appeal, it doesn't matter whether it's a positive or a negative restriction – cut that, a positive or negative covenant, doesn't matter, but the extension of such an instrument to one that actually specifically gives the right of a neighbour to come onto the servient tenement, that's a new proposition and that's a hybrid instrument which is unknown in the law. So that's why this

case has some significance over and above what the parties have actually specifically agreed to.

GLAZEBROOK J:
I'm sorry, I don't think I caught that last point.

MR MILES QC:
The, by defining the restrictive covenant, and I don't mind where – my submission is it's a restrictive covenant, but let's just call it a covenant, to define the covenant as to permit the neighbour to come onto your land, is in part an easement, in part a covenant, and it's a hybrid. It's neither one thing nor the other. And the Courts have said that sort of, invention of something new is inappropriate.

ELIAS CJ:
It's a covenant that is recognised by providing for its notification under the existing law?

MR MILES QC:
Yes, but that only takes us so far Your Honour.

ELIAS CJ:
Well it's really what we discussed earlier.

MR MILES QC:
Yes and what I take from that is that's consistent with a conventional covenant. It doesn't have any rights to permit a neighbour to come across because that's an easement. I'm assured by very experienced juniors that you will not find an authority that suggests that this, a sort of hybrid of the sort that I'm talking about, or put another way, that you can under the guise of a covenant you can effectively grant an easement. That's really the issue I think.

Well Your Honour I did float the possibility that Professor Thomas might speak but I'm conscious of time and I'm not sure that it would be, that it's necessary. The issues covered by that are in those articles that we've given to Your Honour, and again just the theme running through them is that new interest in land are really the province of Parliament.

GLAZEBROOK J:
It's not really a new interest in land, is it, though?

MR MILES QC:
Well –

GLAZEBROOK J:
I mean in the sense that you could have done it, well actually very clumsily in this case, by an easement plus a covenant, so why would you have to have two documents rather than one? What's the issue with that, that everybody's so worried about now we have a notification system and a registration system?

MR MILES QC:
Well I –

GLAZEBROOK J:
If you're not creating a new hybrid, some other sort of interest that is not known to man, or woman for that matter. It's perfectly normal to have an ability to go onto someone's land. You can have a licence, you can have a lease, you can have an easement, you can have whatever you like. So what's –

MR MILES QC:
Just so long as it's not a covenant.

GLAZEBROOK J:
But why?

MR MILES QC:

Because everybody understands –

GLAZEBROOK J:

But why are they so fussed about it, I just can't understand it, it doesn't seem to be within any policy decision now you have notice to rule the world you can understand but there might be something without…

MR MILES QC:

Well I think one reason is that it's important because lawyers understand covenants and easements –

GLAZEBROOK J:

People who might be looking at a register wouldn't have a clue. So ordinary people wouldn't have a clue about these arcane distinctions, would they, or care?

MR MILES QC:

That's why they get a lawyer, who do care.

GLAZEBROOK J:

Well sometimes they don't is the point and a public register should mean that you ought to be able to read the public register and know what's up.

MR MILES QC:

Well I'm not sure how far Your Honour can take that. Does that mean all documents disclosed on a title have to, well, I just don't, that can't be right. It can't – complex documents aren't expected to be understood, necessarily, by someone walking off the street.

GLAZEBROOK J:

But the argument here is that if a covenant says you can go onto my land and you can use the carparks in it explicitly, that because it says it's a covenant

somebody couldn't read that and say I can go on the land and use the carparks.

MR MILES QC:
You can go onto my land. The owner of the, the person who owns the car, who wants to park, says, I'm going on my land to park. If…

ELIAS CJ:
I wonder whether we should take the adjournment now Mr Miles. I am keen to let the respondent have a decent crack so I would like to get on with the respondent after lunch but if you need to finish your answer we'll start with you.

MR MILES QC:
I'm obliged Your Honour.

ELIAS CJ:
Thank you.

COURT ADJOURNS: 1.08 PM
COURT RESUMES: 2.19 PM

MR MILES QC:
Five minutes Your Honour?

ELIAS CJ:
Yes.

MR MILES QC:
Okay, the first point, Torrens system, of course, designed to be easily understood. Second, hence, open for the public to search the register and view all relevant documents. Had they done so, and they would have read the deed, they'd have read the encumbrance, and they'd have noted firstly, commonality of ownership, Recitals A and B. Management of parking Lot 4, Recital C. No positive grant of right to enter. Fourthly, not an easement.

Particularly significant because the title is dotted with easements. Right of way easements, parking easements. It is significant that there was no parking easement registered. It was designed as a covenant. If there was still any doubts in the mind of this person examining what he or she was likely to find when interested in the land, then they would look at the deposited plan. They would find, well of course the deposited plan would be linked with the certificate of title, they get both at the same time, and on the deposited plan you've got those key conditions, which would have rammed home to them what would have already, we say, be clear to them, that the right to enter came from ownership of Lot 4 by Lots 2 and 3, and the resolution and the condition make that crystal clear, hence they would understand that this was a restrictive covenant, not an easement.

Now correct definitions, Your Honour, of instruments and land have real significance because of the importance of land and land ownership. That is why the Courts and Parliament has been so careful over the last 150 years in indicating whether any new land interests in land should be recognised and, if so, how carefully they should be defined. And what you'll find, I am instructed, is that there has been no new interest in land disclosed or indicated by the common law since the 1840s. Parliament, of course, has stepped in when necessary and the best example, within recent times, are making easements in gross a legitimate interest in land. However, the issue of whether covenants in gross should be recognised as an interest in land, was considered in detail by the Law Commission in 2010. They issued a report described as a new land transfer act and specifically looked at whether covenants in gross should be recognised, that's at chapter 7, and they decided against it, and they decided against it essentially because it would clutter the register, and hence inappropriate. But what is clear, from that report, is that the issue of the correct definition of "interest in land" is crucial that it's not for the common law to develop something new. If something new is needed it's to be decided by Parliament, and we say this particular instrument is the hybrid of the sort that I've described.

Lastly, this, not such a significant issue, but the question of what they could have done at the time if they were interested in easements, and we were talking about cross-easements, those, of course, the alternative which I had overlooked, the easement certificate which back in 1989 you could register, even though the parties were the same parties. But it would only kick in if one of the parties transferred the land. So if the parties had contemplated at the time that the chain of ownership, the commonality of ownership would be broken, then the logical way to record that would have been an easement certificate that would have kicked in if and when the commonality of ownership changed. The fact that it didn't, and was never considered, always regarded as appropriate to be a covenant is again yet another powerful indicator that that's what the intended.

ELIAS CJ:
Easement certificates, are they a creature of stature?

MR MILES QC:
Yes.

ELIAS CJ:
Which Act?

MR MILES QC:
Section 90E, Ma'am.

GLAZEBROOK J:
Section what? I didn't catch that?

MR MILES QC:
Sorry?

GLAZEBROOK J:
What was the section number?

MR MILES QC:
Section 90E.

ELIAS CJ:
90E.

MR MILES QC:
Right, well I said five minutes, Your Honour. That was it.

ELIAS CJ:
Thank you Mr Miles. Yes Mr Kohler.

MR KOHLER QC:
Thank you, Your Honour. I'm sorry I'm going to have to skip through it a little bit more quickly than what I would like but I've always found with Courts that never seems to get me into too much trouble.

I'll follow, if I can, the written submissions and start, perhaps, with just an overview of where I'm hoping to take Your Honours under the heading "Summary of Argument", and I'm just adopting for shorthand, land covenant for the memorandum and encumbrance for the encumbrance.

And in 1.1.1 I've said the searches for the contractual purpose, well, it's gone beyond the contract, of course, but for the document's purpose, and it's my submission, and it's something that the Court of Appeal essentially held, it's my submission that both those documents, entered into on the same day, which I say is significant, had a fundamental and simple purpose, which was to provide Lots 2 and 3 with carparking on Lot 4.

Now I'll be taking Your Honours to the document itself in a moment but, just in terms of outline, if one refers to the land covenant you'll find that on the plans is Area A, which is designated as the carparks of Lot 2, Area F in the entry and exit arrows, the carpark access for Lot 2. The covenant is said to be forever subject and forever pertinent, and in respect of the encumbrance,

critical words include carparking or access for the benefit of Lots 2 and 3 and the encumbrance is for a term of 999 years.

And I'll be going through the document in a moment but one of the things I do say is the terms of the documents are very significant. If it was intended to be a document simply between the co-owners of Lot 4, it would say just that and it would say but it terminates when that co-ownership terminated. It wouldn't say that it goes on forever. I say the words "forever" and then "999 years" in the encumbrance document are significant and inconsistent with the appellant's case.

I mean if, for example, the appellants were to say to Your Honours it is implicit or implied, and I say they'd have to say this, implicit or implied that this comes to an end, the obligation is to pay rent and rates, well, it's not rent, but rates and operating expenses come to an end when co-ownership comes to an end, you can't say that's implicit because that would contradict express terms of the contract which are that it continues forever, or for 999 years.

In 1.1.3 I'll be saying to Your Honours that the distinction between positive and negative covenants is of less, if any, relevance now given that post January 1987 both were enforceable. I think the Chief Justice raised this issue with my learned friend and the Act still recognises and defines both positive and restrictive covenants. But it's certainly my submission in this case that it probably doesn't matter too much whether you analyse it in terms of it being a positive covenant or a restrictive covenant. But I say the Court of Appeal were right to say it was positive in essence, or in substance, but it doesn't matter too much, because what I say in terms of a restrictive covenant is that if one stands back and looks at this case as a general proposition, what does the document do?

What the document does, the land covenant, is it affects the natural rights of ownership. I'll take you to some of those in a moment but natural rights include the right to stop someone from trespassing on your land. That's one of the fundamentals. So as owner of land you can say stop. Do not come on

this land. I can exercise my right of ownership to exclude you. And what I say this document does on any interpretation is that the party binds themselves, that is the owner of Lot 4, binds themselves not to do that in respect of two categories of people, Lot 2 and Lot 3. Everyone else in the world they can say stop. Do not come on this land, but in this document they bind themselves not to exercise that right.

O'REGAN J:
Well, they don't have that right against their own owners do they? I mean they don't have the right against themselves.

MR KOHLER QC:
If they're a co-owner they wouldn't, no.

O'REGAN J:
So what's the effect of the covenant? They're not giving up anything.

MR KOHLER QC:
They're not giving up anything in respect of themselves.

O'REGAN J:
I mean they're not saying to the Lot 3 owners you can't come on because they can't say that. They're a co-owner.

MR KOHLER QC:
What I'm saying, Your Honour, is that whether you – perhaps I'll need to analyse it a bit further on but I'm saying whether you analyse it as a positive covenant, which I'll be pressing you that it is, or if it's a negative covenant, post co-ownership, while co-ownership continues to exist, Your Honour's entirely right. Post co-ownership, and I say, and this deed continues forever, irrespective of ownership, and some words in the deed of covenant say exactly that, but post co-ownership continues forever. So now, let's take now. If you read the document what did they – even if you put it in negative terms, what did they covenant to do? What have they bound themselves to do?

They've bound themselves not to exercise their right, natural right of ownership, as against the current owners of Lot 2.

And I'll be suggesting that the appellants, and it is a fundamental assertion as to what the purpose of the document was and, you know, often the search is for what the purpose of a document is. The purpose, they assert, was for the management of Lot 4 as between the two co-owners and I suggest, as the Court of Appeal did, that that makes no sense. If you're simply worried about regulating between the two co-owners of Lot 4, you have a document which is between the two owners of Lot 4. You can do it in a number of ways.

WILLIAM YOUNG J:
But it could be to regulate arrangements between the owners of the two lots in perpetuity. In other words, to regulate arrangements between the owners and their successors.

MR KOHLER QC:
So Your Honour's saying well, instead of having a licence or a contract, for example, if you wanted to bind subsequent owners?

WILLIAM YOUNG J:
Yes. Well, it does do that.

MR KOHLER QC:
Yes it does. It binds subsequent owners but if you were simply wishing to regulate between the two co-owners of Lot 4, it would come to an end when that ownership came to an end. There would be no purpose. If your purpose – if the drafter's purpose is to regulate between the two co-owners of Lot 4, then there usage of Lot 4, it comes to an end when Lot 4 is no longer owned by both of them.

ELIAS CJ:
Well, it can bind the successors but the Lot 4 may still be in amalgamated ownership.

MR KOHLER QC:
Yes, but as soon as amalgamation comes to an end it would necessarily come to an end.

ELIAS CJ:
Yes, but that's not the same as ownership coming to an – I see, you were using it in that sense.

MR KOHLER QC:
Yes.

ELIAS CJ:
Yes, I see. I'm sorry.

MR KOHLER QC:
What I'm saying is if the purpose, if the drafter's purpose was simply to regulate between the two sides of the ownership of Lot 4, then you wouldn't need to involve Lot 2 and it wouldn't continue forever regardless of ownership.

If it was intended to regulate between the two, and we now turn to this document, it wouldn't go on forever. It would say, and it comes to an end when co-ownership comes to an end, or the amalgamated title, if and when it ceases. There is absolutely no point in it continuing forever in my submission.

I'll be saying that the Court of Appeal had regard to the relevant contextual matters and ignored the ones she might have regard to. I'm suggesting the Court of Appeal did not create any new hybrid interest at all. All it did was simply interpreted the two relevant documents in a fairly conventional way and if I'm wrong in that, and Your Honours find that there is some new interest being created, I say to Your Honours, there was no reason not to recognise the rights that that parties have sought to create here. And the article my friends refer to is a plea for that recognition, and I'll be suggesting that, the authorities I'll take you to suggest that there should be such a recognition.

I'll have to quickly skip through my submissions. The background facts I've sought to highlight I've said, they're largely set out in the Court of Appeal's judgment. I'll skip through 2.2, the important facts, just focus on –

ELIAS CJ:
Could you just pause Mr Kohler. We'll sit until five.

MR KOHLER QC:
So we're not so rushed? Thank you Your Honour. The important background factors is (a), the fact that carparking was and is required for Lot 2 owners. When I say "was" it was an apartment block initially, I accept that, and it has become a Lot 2 apartment block, but whether it's parking for the office block or parking for the apartments doesn't matter, there is insufficient onsite, that's a background fact. There has been no diminution in the need for parking and de-amalgamation here, as my friend acknowledged, was only achieved by Lot 4, there's a Lot 4 and Lot 2 co-owner, so the owner of both, representing to the Council that car stackers would be installed to provide additional parking. The odd thing is that one of the appellants here, one of Mr Humphrey O'Leary's companies, protested vigorously, I could take Your Honours to that, but he says the parking in the area is chaotic. In fact, perhaps I will take Your Honours to that.

ELIAS CJ:
Why is it relevant?

MR KOHLER QC:
Well I suppose the underlying commercial need for parking, which I say drives it all, actual parking, has not diminished, it hasn't gone away.

ELIAS CJ:
Well wouldn't imagine that it would have.

MR KOHLER QC:

In Ponsonby, just off College Hill, probably not.

ELIAS CJ:

Yes, I don't think we need to be taken to it.

MR KOHLER QC:

As Your Honour pleases. In paragraph (e) you're probably aware that the Lot 2 owners have been and are required to pay the considerable expenses of and concerning the operating expenses. Now I'll be putting some emphasis on the words "operating" a little later, because I say that's what this deed seeks to do. Perhaps I'll just pause on that. Some of the cases that I'll take you to in the authorities and so on are concerned with parking rights, and one thing the appellant has done in his submissions to Your Honours is to focus not on the parking rights, per se, but rather to focus instead today on the right of way to get to the parking. Now there's a reason why my friend has done that, and the reason why he's done that is because the authorities doubt, or there's some question mark about the creation of parking rights by way of easement. So my friend has addressed you really trying to shift the focus. Now these documents, the Court of Appeal and my submissions, all start with the proposition really, that the primary focus here is on parking rights and the access to enjoy those rights are ancillary or subsidiary to those and that's an important distinction.

The other, perhaps, theoretical distinction between my friend and myself, or conceptual distinction, is that I say when you look at this document, these documents really, in their entirety, the deed of covenant in particular, and you look at the multiplicity of clauses and obligations that are imposed, this is quite different to some of the ordinary parking cases where, yes, parking rights can be created by easement. Because in those cases you've usually got a vacant bit of land and all that the servient tenement is doing is suffering what would otherwise be a trespass. Allowing someone to bring their car onto their property. This document, when you analyse it, or this arrangement when you analyse it, is quite different in nature because what it does is that it requires

the ongoing operational maintenance, I'm using the word "maintenance" in a wider sense than simply looking after bits and pieces, but maintaining an operating carpark forever and so what I say, and that will take us into a definition of what a positive covenant is, because what this document does is that it creates an obligation on the covenantor to maintain this operational carpark. He's even got to rebuild it in the event of destruction. So it's more than simply suffering, as in conventional terms, in easement terms, suffering someone to come onto your land to park.

Now in (e) I've drawn your attention to the fact that the Lot 2 owners have been and are required, are required, the appellants would have it, even if they're not entitled to use it, to keep paying for the cost of it, and the amounts involved have been quite significant, $62,000 in May 2010, I've just chosen a couple of years, $6200-odd in December 2010, it's on the footnote, 26 May 2011, $15,000 and then another $6000 and so on. So quite significant sums of money and I've given you the cross-references to the demands and so on for those money.

The next underlying fact is that there is and always has been a fully formed driveway providing entry and exit to the carparks. It might pay, if I can get my junior to get me the photographs, and take Your Honours to the photographs.

GLAZEBROOK J:
Those were the ones we were looking at before?

MR KOHLER QC:
Yes they were Ma'am. Volume C, 396. If I could just take you to those photographs, and what I'll be pointing out to Your Honours, you may recall on the, perhaps if we also have the little volume of key documents that my friend handed up this morning, with tab 1, I'll be going there pretty soon anyway, and if we turn to the plan, do Your Honours have that, it's the key volume with the plan page, which I think is about the third to last page, and 396 and so on. Now we have 396, as you can see, the grill is the entry to the basement. Now the only party who's entitled to park in the basement are the Lot 2

owners, so that's where their carparks are, and as you've heard you can drive down from the top, in fact, and you exit down the bottom, and if you look at the diagrammatic representation on the plans on tab 1 you'll see that the drafters of the deed –

WILLIAM YOUNG J:
Sorry, just pause there. Can't Lot 3 use Area C?

MR KOHLER QC:
Area C, ah, yes, but that's not underneath the building.

WILLIAM YOUNG J:
Is that not another the building?

MR KOHLER QC:
Well I don't think it is.

WILLIAM YOUNG J:
Perhaps it's not.

MR KOHLER QC:
My friend is saying it is under the building. It doesn't really matter to me. I didn't think it was. It doesn't really matter to me Sir, but it's area A, I thought the solid wall we see by 47 was the underneath, but it may be that that bit of C, it really doesn't affect my argument at all if that's solid or not. What I was drawing to your attention is the entry and exit is actually, the drafters have taken the trouble, and I'll be putting some emphasis on this document, this is part of the deed itself, and the words, it's diagrammatically shown and with a notation, you've got the arrow showing entry and the arrow showing exit, and they've taken the trouble to write in there, "Entry and exit to basement." Now that's the, my friends described it as triangular. It's sort of triangular, it's got a bit of a kink out the side. That's just the area that we're talking about in terms of the right of way to get into the parking spaces we see under the building. And what I, one of the points I will be making to Your Honours is that

I say the drafters of the document haven't put those, haven't drawn the arrows there for fun. They haven't put the words “entry and exit to basement” for fun. They've put them there to indicate how the entry and exit to the basement is to be enjoyed by the Lot 2 people by where it's shown, and that corresponds to areas we see on, in photograph 396. So if you were to draw an arrow on 396 you would be going in from here and you'd be exiting out that way. Now just as a side issue, while we've got these –

GLAZEBROOK J:
Is there a point made in respect of where Lot 3 people have to go in and out on the plan or…

MR KOHLER QC:
I hadn't really looked at it from Lot 3 Your Honour. I've looked at Lot 2 –

GLAZEBROOK J:
No, I just, because the Lot – it's probably just to get my bearings in terms of where you can drive and where you can't.

MR KOHLER QC:
Yes, yes, well what I'm saying is that the entry and exit to the basement, which is there, that corresponds to the arrow we see entry and exit.

GLAZEBROOK J:
Yes, I certainly understood that point. I just wondered how you get to the top, that was all.

O'REGAN J:
You just drive into G I think.

MR KOHLER QC:
You just drive in.

O'REGAN J:
So you go across the boundary into G.

GLAZEBROOK J:
Oh right.

WILLIAM YOUNG J:
Is the road, is it envisaged that the traffic is only one way going down to Hargreaves Street?

MR KOHLER QC:
That's my understanding, of how it works, and I've been on site, is that, and this is what the Court of Appeal talks about, is the entry and exit, you drive down the right of way this way from the top, entry in that, back out, and that's not a two way exit onto Hargreaves, that's going out into Hargreaves.

GLAZEBROOK J:
Okay.

MR KOHLER QC:
And while we're on these photographs, just so you understand what 399 and 400 are showing, 399 is showing, this is a photograph of an entranceway between Lot 2 and Lot 4. So, and there's a number of photographs, because one of the alternative claims by the respondents in the High Court was that if my friend's right about Lot 2 having access problems, ie we've got, the owners have parking rights but not they have an access difficulty, then one way of curing that is either an application under landlocked land, and that can be made, it had been made in the proceeding, but also it would be simply to enlarge that entry so that the Lot 2 owners, if my friend's right about access, can then drive straight from Lot 2 onto Lot 4, and that was the reason why these photographs 400 is from Lot 4 looking back, so that's the mirror photograph pretty well of what we see on 399, so 399 you're standing on Lot 2 looking at Lot 4, and in photograph 400 you're standing at Lot 4 looking at Lot 2.

WILLIAM YOUNG J:

What's happened, if anything, to the dispute as to the entitlement of the Lot 2 owners to go down the drive to Hargreaves Street that's shown on 397?

MR KOHLER QC:

Well they're enjoying that right because the Court of Appeal found that the right to drive down there was implicit.

WILLIAM YOUNG J:

Right.

MR KOHLER QC:

And I'll be saying –

WILLIAM YOUNG J:

Based on the arrow, the direction of the arrow?

MR KOHLER QC:

Well they, there are three things I'll say to Your Honour about the access. One is, I say the document itself, objectively interpreted, has these, these words mean something, and what they are indicating is how the right to park is to be enjoyed, because it's fundamentally a right to park there, and this is how it's, this is a subservient or ancillary right, so the first answer is, it's in the document.

WILLIAM YOUNG J:

But so, what part, is it just the direction of the arrow?

MR KOHLER QC:

And the words "entry and exit to basement".

WILLIAM YOUNG J:

Yes, because, okay. Because it would be possible to get entry to the carpark and possibly exit going the other way. Or is that too narrow?

MR KOHLER QC:

Going the other, uphill Your Honour?

WILLIAM YOUNG J:

Yes.

MR KOHLER QC:

I don't know how that could, how well we'd get into the carpark going uphill.

WILLIAM YOUNG J:

Well, no. If you come from the top down which is the way entry is envisaged with the arrow then, presumably, if that driveway is wide enough you could go uphill too, out.

MR KOHLER QC:

Yes. I think the driveway's pretty narrow. There's a photograph of the driveway there and it's not how the right is being exercised. It probably wouldn't –

WILLIAM YOUNG J:

It's at 398. It's going up the side of the two buildings.

ELIAS CJ:

Why are we looking at all of this? Why does it matter?

MR KOHLER QC:

Why does this matter?

WILLIAM YOUNG J:

The argument is that it's implicit in this if there's a right of entry, a right of exit and it includes the driveway.

ELIAS CJ:

Yes, I see.

MR KOHLER QC:

Well there's three things I'm saying about the right of way part. I've said to Your Honours that we should start with the parking and work that way but, just while I'm on this point about the right of way, I'm saying three things. I'm saying the document itself and the words and the arrows that I've taken you to is what I rely on, they provide how the Lot 2 owners are to enjoy their parking right. So I say that's explicit.

Secondly I say, if it's not explicit then it's certainly implicit and the Court of Appeal found it to be implicit.

Thirdly I say, I rely on *Moncrieff & Anor v Jamieson & Ors* [2007] UKHL 42, [2007] 1 WLR 2620 from the House of Lords which I'll be taking Your Honours to. *Moncrieff* is an interesting case. It involves the inverse situation where it is a right of way which is granted and the issue is whether or not, as a subservient or ancillary right, there is a right to park. And what Their Honours found in that decision was that if you grant, and they, simply, the general proposition that if you grant right to have an access way, you necessarily grant the sub-rights that are necessary to enjoy the primary right. And so what I'll be saying is if we look at *Moncrieff* and apply it here, you say if the right to park is granted, so if I'm right on that and we're now considering the right to get there and actually enjoy it, I say, on *Moncrieff* it's ancillary in any event. And I'll take you to what Their Honours say because there's quite similar propositions that are helpful here.

Now in section 3 of my submissions I've set out what the appellants' case is and the appellants, in my submission, and one can do this in the alternative of course, but my friend didn't quite put it in the alternative. My friend submits to Your Honours that the words should be given an actual and ordinary meaning and as an interpretive exercise you shouldn't go too far beyond the documents themselves, yet a little later in submissions my friend says, well, but you should be looking at things like council files and all sorts of things.

Now I've given you in my written submissions various authorities, the well-known authorities on *Zurich, Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010 NZSC 5, [2010] 2 NZLR 444, and so on. There is, on interpretation, I'm not sure how familiar Your Honours are with *Marks & Spencer pl v BNP Paribas Securities Services Trust Company (Jersey) Limited & Anor* [2015] UKSC 72, which came out from the House of Lords in December last year, where the majority there really did criticise Lord Hoffmann's test in the celebrated decision that we all quote from, *Investors Compensation Scheme Ltd v West Bromwich Baker Street* [1998] 1 WLR 896, and what the House of Lords does in that decision is to say you need to separate out the interpretive exercise from the exercise of implying terms into contracts, and you finish one really before you turn to the other. So it's an important new decision on interpretation.

But I, like the Court of Appeal, say to Your Honours that this case doesn't turn, and shouldn't turn, on fine distinctions such as are made in that case, nor on the distinction between ordinary contractual documents and public documents on the register because the Court of Appeal concluded, and in my submission correctly, that it didn't really matter whether you took into account extraneous material or not because the conclusion that one reaches is pretty clear.

And I say to Your Honours that when you look at the extracts that my friend wishes to take you to from the Council file and so on, they don't actually support the proposition he's advancing at all in terms of interpretation even if, contrary to what I'm going to submit, you have regard to it. I say even if you have regard to it, it doesn't make the slightest bit of difference.

Now I've set out what the respondents' submissions are in section 3. I'll skip over that. Section 4, the Court of Appeal's approach to interpretation. I suggest that it's entirely conventional. They quote *Zurich*. There is the *Marks & Spencer* decision which Your Honours might be interested in, but really this case isn't going to turn on that analysis.

The Court of Appeal in its judgment recognised, drew attention to the fact that there are divergent views overseas on the extent to which extrinsic evidence should be taken into account in respect of public documents, the *Opua* decision, the Australian decisions and so on. And, again, the Court of Appeal didn't find it necessary to review that issue, and I'm suggesting that's entirely so.

Now what they did hold, and what I support, and most of my submissions really do no more than supplement the essential core of what the Court of Appeal did, and what it did, if you break it down, is that is starts by saying the two documents had to be read in conjunction. That's the encumbrance and the deed of covenant. They're dated the same day.

One thing I would say to Your Honours in respect of the encumbrance, and I think this is reflected by Justice Peters, who records it in the High Court judgment somewhere, I'm sure I can find it if I have to, but it wasn't, and I suspect it's not challenged now, it wasn't challenged in the High Court and can't really be but the memorandum of encumbrance is for the benefit of Lots 2 and 3 so to the extent that it's relevant there's no privity issue. So one cannot say that the owners of Lots 2 and 3 cannot say they are beneficially entitled to the benefit of the memorandum of encumbrance, and Your Honour will recall there's no privity issues. And that, of course, provides that without the prior consent of a council the encumbrances shall not permit the land described to be used for any purpose other than, so just the same.

The second thing the Court of Appeal did is record that the documents had to be considered against the relevant background statutory context. And Their Honours referred to Professor Brookfield's, an article by Professor Brookfield which suggested that by use of the recharge arrangement we see in the memorandum of encumbrance, the memorandum of encumbrance here is drafted as a recharge, so there's a rental. I can't remember how much it is per year. It's a –

WILLIAM YOUNG J:
Five cents I think.

MR KOHLER QC:
Five cents if demanded, I think, Your Honour. But the purpose of it is that you can create these covenants by having a mortgage, not because you want five cents per year but because you want the mortgagor to observe the ancillary conditions in the mortgage, and that's what Professor Brookfield's article is about. Now I know Associate Professor Thomas in one of his articles is critical. Professor Brookfield disagrees with that I believe but that was the methodology and a very common one for local authorities dealing with subdivisions.

My friend suggested about conveyancing practise. There was no evidence in this case about conveyancing practise from experienced conveyancers, and the documents here were prepared by, I think it was Simpson Grierson, who are the common solicitors for Auckland Council in respect of the document I'm taking you to now, and the deed of covenant way McElroy Milne I think it was, yes. Both experienced practitioners who, no doubt I would suggest, considered that they were perfectly entitled to create the interests that they created in the documents. So the proposition that no one would try and do this or create these interests in my submission is answered by the documents themselves.

But the second point, as I've said, the Court of Appeal correctly held that you've got to consider the documents against their statutory context. They were drafted in accordance with schedule D, which is then in existence, in accordance with a regime suggested by Professor Brookfield many years prior.

The third thing they did is that they said the documents had to be considered in their entirety. Clause 3 should not be read in isolation from the other provisions, and I'll come to the document in a moment but I say so far nothing unconventional or surprising about that. They held, in relation to interpretation

of covenants, whether it is negative or positive depends in substance, not merely the form of the covenant, and there's plenty of authority for that. You look at the substance.

In (e) whether a covenant requires the covenantor to incur expenditure has long been regarded as a relevant factor in the consideration of categorisation, ie. if you're required to spend money, that tends to show it's a positive covenant. That's what the authorities say, and they are set out in the Court of Appeal judgment. Documents are entered into to address the inadequacy of parking in the subdivision.

(g), the Council had no interest in how Lots 2 and 3 regulated their relationship as owners of Lot 4. What the Council were concerned with was if there was enough parking for what they were allowing.

(h), with a covenant in gross, which is what the encumbrance is, was a recognised method of achieving those objectives. An actual and ordinary meeting was positive.

(j), no commercial purpose in requiring costs of ongoing operations to be incurred without actual access. The encumbrance itself recognises its purpose was carparking and access for the, "Benefit of Lots 2 and 3," and they held that it was implicit that the right includes the right to use the designated access ways to the existing driveway.

Now, the criticisms firstly are it is a construction criticism initially. Failure to properly interpret the plain language used and, the proposition is, had they not moved beyond the document itself but just interpreted it, it was only to regulate Lot 4 usage. And the Court of Appeal's conclusions, as I've set out above, answer that, and I'd add the following. I've submitted with historically customary to couch covenants in negative language. The search is for the substance of the covenant, as everyone concedes, and as I understood my friend this morning, I understood him to say he doesn't quarrel with the next proposition from the Court of Appeal's judgment that when you say no

one other than X may use the carpark, you understand that to mean only X can use the carpark. The Court of Appeal concluded that it was, in substance, positive.

Then I've got an extract from *Brookers*, which is the natural rights provision that I addressed Your Honours on at the beginning. It's in the bundle. "Natural rights in land are rights that exist automatically as part of an estate in land, for example, a right of an owner to exclude others from land as a natural right which may be protected by an action for trespass. Natural rights may be abrogated, inter alia, by the owner granting other people rights in the land (a right of way, for example)."

If you stand back here, in my submission this is a core part of the case, and it doesn't matter whether it's positive or negative covenant. What's happening here is that Lot 4 owners can say, as I said, stop, you can't park here. That's my natural right as owner. By the deed they've covenanted, in respect of Lots 2 and 3, never to do that. If you find otherwise, if the Court was to say, well, you can do that then, in my submission, what the Court is doing is allowing them to do precisely the thing that they have bound themselves never to do. It could not be more direct.

Now if I could take Your Honours to the wording of the covenant, and I don't know if it's because I'm particularly dim, but one tends to find that whenever you go through it there are words pick up half way through that you haven't seen, and the deed of covenant itself makes it very clear, in my submission, that the interpretation favoured by the Court of Appeal must be right. It must exist and the essential competition is between whether it goes forever, regardless of ownership, or whether in my submission, and I can't get away from it, whether it implicitly comes to an end when you have a de-amalgamation, or whether the obligation's come to an end on de-amalgamation.

And if we turn, we've got page 1 we've had. Page 2, the words that I draw your attention to are the, obviously, operative middle section. They set out

what's being covenanted and the words are, "To intend that Lot 2 shall be forever subject to these covenants and these covenants shall be forever a pertinent." And that's something I emphasise because I say had the drafter's intention been to tie it to co-ownership of Lot 4, that's what it would say. That's point 1.

And point 2 is, you can't say it's implicit or implied in there, ie. that if there's a de-amalgamation and the ownership splits up, you can't say it's implied because that would contradict the very words of the clause, which is one thing an implied term can never do.

And in terms of the operating expenses and outgoings, I place emphasis on the word "operating" because that goes back to what I'm suggesting to Your Honours, which is that this is an operating carpark. This is just more than letting someone else park on your land, on vacant land, or on land that's just round the back or something like that. This is an obligation that goes much further. It's the operator carpark and if you're talking about the current situation that the appellants say should be the contractual intent, or the document's intent, it would be that the building remain vacant, that no one can park there, that the Lot 2 people have to pay the cost of it remaining and being maintained as an operating carpark. It has to be rebuilt by Lot 4 if it's destroyed. It has to be insured and the like. Now, in my submission, that makes no sense and flies in the face of words such as operating. It's an operating carpark.

Further at 1.1, about eight lines down it talks about the carpark, control and maintenance of the carpark in the use or occupation. So I'd emphasise the words "use" and "occupation" of course. And then in paragraph (a) where it's talking about the payment of rates, you will see three lines down, payable by the authority in respect of the carpark, "Irrespective of the ownership." Now I say those words are completely inconsistent with the appellants' proposition that –

WILLIAM YOUNG J:
What paragraph? Sorry, I've lost that.

GLAZEBROOK J:
1.1(a).

MR KOHLER QC:
1.1(a), three lines down

WILLIAM YOUNG J:
I see, sorry.

MR KOHLER QC:
And then we have over the page all these costs, if I pause on (d) for example. Costs of operating. (e), costs of lighting and so on. Security services in (g) and so on. And in paragraph 1.2, I think one of Your Honours, Justice Arnold, I think, picked up 1.2 about three lines down. The registered proprietor from time to time, so again contemplating not that these owners will be forever locked together. And use, the usage clause at page 7 of the document. I think this is probably just a repetition in respect of Lot 3 of what we already have. Oh, no, it's not. It's the use clause.

So the registered proprietor, again, we have from time to time, not the registered proprietor at the time it's drawn into or the registered proprietor who co-owns or anything of that. It's whoever's from time to time during that period, which is forever, shall not use or occupy. Now I could also say to Your Honours, and I don't think I've put this in the written submission, but I could also say this, the Court of Appeal could also have said this, that what's meant by user occupy. I would suggest that user occupy includes exercise in dominion over, or control over, a carpark. Occupy might be putting something physically there, but if you have a user occupier then obviously there's a wider catchment intended by the joinder of the two words. So user occupier I would suggest would include exercise in dominion over and exercising dominion or

control over would include stopping someone, ie. Lot 2, from parking there, and that's what they've covenanted, promised not to do.

So the rest of the words in the operative clause are as set out in 3.1. That's obviously the critical clause. It said they will not use or occupy nor will they let anyone else use or occupy. Perhaps I'll come back to that in a moment. Then we've got insurance in clause 3. It's got to be insured. Destruction of carpark, in my submission 8.1 is very significant because you've got a carpark which, on the appellants' argument, the drafter's intention assessed objectively. The drafter's intention is that in the event of amalgamation or co-ownership coming to an end, their proposition is that the drafters here intended that it would be forever maintained and rebuilt and so on.

Could I just pause and duck in to one of my authorities on the exercise. I've got a bundle of authorities, Your Honours, on the exercise that the Courts engaged in, and it's the *Marks & Spencer* decision at tab 8. I'll be taking Your Honour to Lord Neuberger's judgment at page 7 where he has quite a bit to say about the interpretation exercise. Paragraph 21, His Honour says, "In my judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in *BP Refining* and so on. Lord Steyn rightly observed – Now this is the bit I want to take Your Honours to because it's easy to – we all know this, but it's easy to forget it in terms of the interpretive exercise because Your Honours might think maybe the drafters here just assumed it would be forever amalgamated. Maybe they didn't turn their mind to it. Well, I say that doesn't matter in the slightest because that's not the question you ask.

The exercise, as Lord Neuberger say, quoting from Lord Steyn, "Rightly observed that the implication of a term," so say it's implicit, "Was not critically dependent on proof of an actual intention of the parties when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the

hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting." So what one does, of course, is you say, okay, given this contingency, in order to interpret the contract, it's an interpretation issue, in order to work out what this contract actually means, we don't just say well, what did the drafter on the day understand, and it might be a letter saying from him. You don't look at that. What you do is you – it's a theoretical hypothetical exercise, but it's a fundamental one. You say to yourself, had they addressed this contingency, using the contract, what would they have provided for? So I suggest that that's reasonably important.

Returning to the deed of covenant, if I may, at tab 1? I think I was taking Your Honours just thought it. I'd taken you through the destruction of the carpark. Page 9 of the deed, paragraph 10.1, which provides that the registered proprietors of Lot 4 shall, and the word I'd draw your attention to next is "always". So I would suggest to Your Honours that if the intention was that it come to an end on de-amalgamation, then the word always wouldn't be there.

Page 10, over the page, and the definitions, and I know Your Honours have already looked at that but in 12.1 you have, quite clear in my submission in paragraph (a), that the covenantee is going to include all the respective and successors entitle of each convenantee and in (b) all the covenantors for the time being, and all their respective executors, administrators, successors assigns, successors in title of each coventantor and, if more than one, jointly and severally.

So, I say, what you take from all that are two essential things, is that (1), it's an operating carpark, more than just suffering as in an easement type situation, someone to encroach onto your land, number 1. And number (2) is, it's expressly to go forever regardless of what changes to ownership there may be.

In paragraph 8 of my written submissions I'm addressing the proposition that my friend put to Your Honours which was that the Court erred in taking into account something which happened 16 years later, ie. the de-amalgamation, and they're suggesting that's a wrong approach.

In 8.2 I've said that underlying the contractual theory on the purpose of, or propose of, approach to contract interpretation is a very sound fundamental principle. It is, and it's self-evident if one thinks about it. It is that parties do not generally, some would say never, but do not generally draft documents which are going to have absurd consequences, or might have absurd consequences. That's not implying because you think something's more sensible or implying because you think it's fair, or implying because you think it's reasonable. It's a fundamental contractual principle on interpretation which is objectively assessed, and we're looking for the objective intention of parties in contract and in documents such as this. Objectively assessed parties don't intend that their deeds may end up being absurd.

Now what I've suggested in 8.3 is whether the absurdity itself eventuates within a week, month or a year or 16 years later is irrelevant. It's not the fact of the eventuality occurring that's in issue, but rather the parties' intention at the time the contract was entered into. So the question here, I've put in 8.3, is whether, and assessed objectively, the parties in 1989 intended that in the event of co-ownership of Lot 2 coming to an end, and remember here this covenant's to go forever and the encumbrance for 999 years, and in my submission anyone cognisant of that factor would expect there to be changes as companies go bankrupt, off the register, sell, people die and so on.

Remembering that it's going forever, if co-ownership has come to an end should they be taken to have interpreted that the parking building would then remain forever vacant and so on? Objectively assessed would they have intended by their agreement that absurd consequence? Was that objectively the owners or the Council's intention?

And in my submission in 8.4 I've suggested that the appellants' submissions, and I think the Chief Justice was putting points in the same are to my learned friend, misunderstood the Court of Appeal's conclusion on this. The Court did not say that the meaning of the covenant or encumbrance changed over time. There are some in some of the authorities on Land Transfer Act documents, which Your Honours may come across in research and so on, there are authorities that do suggest that perhaps some land transfer documents might change over time, and the meaning might change over time but the Court of Appeal didn't feel it necessary to go to that, and I'm submitting this is not a case that you need to go to that. And the Court of Appeal certainly did not go to that on that issue. It did not say that the meaning was one thing before de-amalgamation and something else afterward and in my submission in 8.5, the appellants' submission on the issue confuses the occurrence of an event with the assessment of original objective intention.

Now the appellants, I suppose, in an alternative submission to the one that the words should mean what they say, which I join them in, suggests that the Court erred in failing to have regard to three things in particular. I've set those out in paragraph (a) to (c) of paragraph 9.1, and the first thing that my friend referred to was the DP plan, which I think is at page 916 of the bundle, and I'll just take Your Honours to that if I may.

GLAZEBROOK J:
So we don't have that in the key documents?

MR KOHLER QC:
It is in the key document my friend's just said. Yes, I think it is, it's at tab 10?

O'REGAN J:
Tab 11 is the actual registered one I think.

MR KOHLER QC:

Yes. So my friends say, “Well, the Court in interpreting the memorandum of encumbrance and the deed of covenant ought to have had reference to this,” and the first thing I say is the first, the plan that the Court had to have regard to was the plan that was incorporated as part of the deed, that's the first point. Secondly, in my submission this document, even if you were to have regard to it, and I’m suggesting you probably shouldn't, because you should be able to look at the deed of covenant and memorandum of encumbrance and stop there. But even if you had regard to it it doesn’t alter anything. If you look at the approval date it’s August 1998. Now it’s deposited in 1989 but the document itself, because we’re talking about the Council approval part of it, was a year before, and it contains references to a number of interests, easements and the like, and it refers to the amalgamation condition. Well, the answer I say to that is, “Well, so what?” That doesn’t actually tell you anything about the covenant and the encumbrance. I suppose it’s being put simply as, well, the parties here or someone here, whoever drafted those other instruments that we’re talking about, and I don’t know that they’re in the bundles, but the various instruments, they knew that they could do things by encumbrance and therefore they would have done this one by an encumbrance, I think that's the proposition being made. But in my submission it doesn’t –

WILLIAM YOUNG J:

By easement it’s not.

MR KOHLER QC:

Sorry, by easement, sorry, by easement. I say to Your Honours that you can create interest in a whole lot of ways. You can –

WILLIAM YOUNG J:

Are there any cases you're aware of in terms of which, well, which deal with conferring rights of access to land by covenant rather than easement?

MR KOHLER QC:

I haven't found a lot either way.

WILLIAM YOUNG J:

Any?

MR KOHLER QC:

Well, I haven't actually gone on a search for any, but I have found things which are pretty well on point I think, Your Honour, and probably the best answer is to take you to the statute of what a covenant is, because it's defined, the statute definition of "covenant". Now I don't think that's in the bundle.

ELIAS CJ:

Which statute?

MR KOHLER QC:

Property Law Act.

ARNOLD J:

Yes, it is.

GLAZEBROOK J:

Well, at section 126 it's got, we have got a definition of positive covenants.

MR KOHLER QC:

Positive covenant.

GLAZEBROOK J:

And then we were told that "restrictive covenants" just has a "not" in it but…

MR KOHLER QC:

There's a definition of "covenant simpliciter".

GLAZEBROOK J:

Is that in…

MR KOHLER QC:

The current Property Law Act, and I've just dug it out just this morning.

GLAZEBROOK J:

Oh, the current one, okay.

MR KOHLER QC:

But I'm reasonably confident the old Act would have been the same but I haven't over lunchtime been able to check.

GLAZEBROOK J:

So would be in section 2 presumably in the general definition section?

MR KOHLER QC:

Section 4 of the current Act.

GLAZEBROOK J:

No, of the previous Act presumably it would.

MR KOHLER QC:

I presume so.

GLAZEBROOK J:

Just a general definition.

MR KOHLER QC:

Just a general definition of what a covenant is. Because my friend was saying, "Well, oh, no, you couldn't do this by way of covenant." Well, and he said, he made reference to the statute. Well, the statute defines "covenant" as, it's a pretty simple definition, "'Covenant' means a promise expressed or implied in, (a), an instrument or, (b), a short-terms lease not made in writing." Now it's not the latter, so what is a covenant per se? A covenant is a promise

expressed or implied in an instrument, that's all. So in my submission – well, I'll come to positive covenant in a moment, because I say I can fit this document within the definition of positive covenant as well, and not that I say it matters too much. So that's the definition of "covenant".

ELIAS CJ:
Mr Kohler, we'll have our break at 3.30, I'll just mention.

MR KOHLER QC:
Yes. I'll take you to this after. I'll just let you know where I'm heading on this for a moment.

I'll take you to the authorities, Hinde, McMorland and so on and *Brookers* on what an easement is and the examples of easements, and there's a whole lot of things that are commonly created by easements. In fact if I – perhaps I'll take you to that right now. Perhaps if I take you to *Laws of New Zealand* might be a good starting point, tab 5.

GLAZEBROOK J:
Is that in your authorities?

MR KOHLER QC:
Yes, of my – sorry, Your Honour, tab 5 of my authorities. And this is partly where I say my friend has, as it were, changed tack to focus on the right of way first rather than the parking. Let's focus on the parking first. Now in *Laws of New Zealand* you get a similar definition in *Brookers* and in Hinde, McMorland & Sim, we have example of easements, the type of thing, because as I understand my friend's proposition it is, "Of course, this would have been created by way of an easement if this had been intended." So you've got examples of easements, numerous miscellaneous easements that have been recognised sometimes only inferentially by the Courts, "Nail trees to a wall, hang washing on lines, manure on neighbour's land, serviced by mining operations," and so on and so on down to, "use an

airfield." And then you have after the bullet points – this is para 61 – sorry, Your Honours, it's tab 4, did I say 5?

WILLIAM YOUNG J:
You did, I think.

MR KOHLER QC:
I'm sorry, I had you at the wrong tab. Tab 4. So we've got the examples of the type of thing that is created by easement, as my friend says, would have been the inevitable way of doing this one. Now you've got examples of the easements and then we start off with the nail trees to a wall and some of the other slightly amusing easement-type situations. But once you work your way through the bullet points, which get down to, "Use an airfield," you have, *Laws of New Zealand,* "A right to park a car anywhere on certain parkland does not amount to a claim to the whole beneficiary of the servient land, and so can probably exist as an easement. But a right to park a car in one particular defined space in a parking area might possibly be held to amount to a claim for the whole beneficial user of the servient space and thus be incapable of existing as an easement." And I'll take you to some other comments and some other cases where for a considerable period of time, and about the time that this document was drafted, there were real concerns and doubts about creating parking rights by way of easement.

Now is that convenient for Your Honour?

ELIAS CJ:
Yes, thank you, we'll take 15 minutes.

COURT ADJOURNS: 3.28 PM
COURT RESUMES: 3.48 PM

ELIAS CJ:
Thank you Mr Kohler.

MR KOHLER QC:
Your Honours, I've jumped about a bit in the submissions but I'm getting there and you'll be pleased to know I'm confident I'll be through, well through.

Just before the break I was suggesting to Your Honours, or taking you to Hinde McMorland, I think it was, and the *Laws of New Zealand* latterly in terms of easements and what sort of easements are permitted, and if you go to the text, in the standard text, the reference are in my submissions, you'll find that there was considerable doubt about whether rights to park could be created by easement.

And perhaps if I could take you to section 14 of my submissions at page 19, and I've suggested to Your Honours that interests in land can be created in a number of different ways, and I've set out some of the examples. Now the last –

WILLIAM YOUNG J:
A covenant doesn't create an interest in land does it, or does it?

MR KOHLER QC:
Well, a covenant is defined so widely in the Property Law Act. I mean the document itself –

ARNOLD J:
Covenants were recognised as creating equitable interests weren't they?

MR KOHLER QC:
Yes. And one of the things, Your Honour, I'll probably take you to is at section 14, paragraph 14.3, I've set out an extract –

ELIAS CJ:
Of what? Of yours?

MR KOHLER QC:

Yes, 14.3 of my written submissions, and I'm not quite sure whether, I couldn't quite find when I was having a break, paragraph 16.01 on, I'm sure this is a correct quote from it, but whether I've actually included that particular paragraph in the bundle I'm not sure. But what Hinde McMorland & Sim say is, and this is not particularly controversial as I understand it, and my submission is that the appellants overstate the distinction between covenants and easements. And it's my submission that you can make a conceptual distinction. The difference arises generally is a matter of conveyancing practice rather than a hard and fast legal rule.

And I refer to Hinde, McMorland & Sim. The quote there, "The fundamental difference between an easement and a freehold covenant is that the former is a grant to a dominant owner of a right in respect of a servient tenement, while the latter is a covenant or other binding promise by the servient owner affecting a right which he or she has by virtue of ownership of the servient tenement. But this merely expresses the difference in terms of the form of the creation of the rights, a grant as against a binding promise." So what the authors are saying it's really describing the clothes that the documents are wearing, what it's said to be.

In 4.1 I've set out, as I said a moment ago, that I'm not quarrelling with the proposition that you can create interests in a number of different ways. And, although my friend's submissions have developed somewhat more recently but the fundamental proposition, I thought, initially at least, was that the Court of Appeal should have recognised that inevitably as a conveyancing practice these documents would have been drawn up in a certain way. They would have been joined up as easements rather than as covenants.

And what I'm about to do is to suggest to Your Honours that there are good reasons why the drafters may have done the way in which they did, and good reasons at the time. It's changed a little since because of the statutory change but at the time there's perfectly valid reasons why they did as they did.

I've already referred in 14.5 to that extract from *Laws in New Zealand*, paragraph 61 which is the uncertainty about parking rights being created by way of easement, and you'll see that also in the *Brookers Land Law* reference I've given you, and I think it's mentioned in some of my cases in the bundle that I'll be taking you to in a moment. So there's uncertainty about the creation of parking rights by way of easement and I've addressed two particular issues.

One is the separate ownership issue which my friend has referred to earlier and acknowledged that the four essential characteristics of an easement, and this is taken straight from the texts that I've referred to. There must be a servient tenement, 14.6, servient tenement must accommodate and they must be separately owned, and in Brookers paragraph, "A dominant and servient tenement must be separately owned. An easement is a right in another person's land. No person may have an easement over their own land." I'm quoting Metropolitan –

WILLIAM YOUNG J:
So if A and B owned land, can they give an easement to A?

MR KOHLER QC:
If A and B – no because you can't give an easement over your own land.

WILLIAM YOUNG J:
But A and B, they own the land jointly or as tenants in common, so they're not – the land ownership is not the same, although it overlaps. Now probably the answer may be they don't need to because A has the right to use the land anyway.

MR KOHLER QC:
So the question is whether co-ownership would break that principle?

WILLIAM YOUNG J:

Yes. So where the servient tenement is owned by co-owners, does this principle prevent an easement being given in favour of one of the co-owners?

MR KOHLER QC:

In the reading I've done on this section, which is a fair amount, I haven't come across any suggestion that it would, that it would make any difference, that it's co-ownership rather than sole ownership, but I can't point you to an authority to say it definitely couldn't make a difference.

ELIAS CJ:

That amalgamation condition imposed by the Council is unlikely to have been one-off thing I wouldn't have thought.

MR KOHLER QC:

No.

ELIAS CJ:

It must have been something that was not unusual at that time.

MR KOHLER QC:

Yes.

ELIAS CJ:

Do we know anything about that?

MR KOHLER QC:

Well, yes, very much so. This whole, this scheme of documents, and this move the – you'll recall part of the Court of Appeal's judgment which was you had the Professor – as Goodall and Brookfield had all the conveyancing precedents. You may recall the old texts.

ELIAS CJ:

Yes.

MR KOHLER QC:

And Professor Brookfield had identified this methodology of imposing covenants through the back door, some would say, and I know Associate Professor Thomas thinks through the back door, but using a recharge to impose covenants where there was otherwise difficulties, and so the Court of Appeal in this case has said, the drafters here have clearly had recourse to, if I could it, the Brookfield regime and procedure. So they've started with – that's why they've uplifted it from the Schedule 2 to the Act and that they've created a memorandum of encumbrance and then you've got the deed of covenant which goes with it.

ELIAS CJ:

Yes.

MR KOHLER QC:

So, yes, I – and in terms of –

ELIAS CJ:

I suppose what I mean is there must be other examples of this around. It's just following on really from what was being put to you.

MR KOHLER QC:

Yes, and one thing I would say on cases on positive covenants where it was put to me, and I've got many authorities that I can point to. Of course the ability to have a positive, Your Honour, didn't come in until 1987, so we don't have – there's no point in reaching back for 100 years for examples because by law one could not create positive covenants. So necessarily it can only be since 1987.

And to similar effect to the extract I've just read you from Brookers is the reference in Hinde, McMorland & Sim at paragraph 14.8 of my submissions which is basically saying that you can't create interests in land that you own, or easements and land that you own. They merge once you have joint possession. And, of course, in 14.9, I'll point it out, with that difficulty that

problem no longer exists. So you can now create an interest by virtue of the amendment to the Act in 2002.

Now the second reason, and I'm not advancing these, I'm not suggesting, in fact I would suggest if you look at the more recent authorities on easements, they tend to be to the extent that yes you can create these rights, parking rights. I'm not suggesting you can't, but what I am saying is that at the time this was drafted there is good reason why the draftsmen and draftswomen have drafted it the way in which have.

There was also uncertainty about the right to park cars, whether it could even be an easement, and I've given you some references to that. The principle of right cannot be granted as an easement if it's tantamount to a grant of possession or joint occupation of the land. The right to park a car or cars on another's land has been considered as a possible easement. The issue, which also applies to some easements, which is listed above, is one of principle whether the parking right ostensibly allowed is such as to amount to a claim to sole or joint occupation of the allegedly servient land. Much depends on the particular facts of the individual case. So, what you have are, and I've just picked out two reasons why the drafters may not have gone down the easement road.

I've probably covered 15 in my answer to Your Honour, the Chief Justice. I should point out that in the judgment they refer to the Court of Appeal judgment of *Jackson Mews Management Ltd v Menere* [2010] NZSC 39, [2009] NZCA 563, [2010] 2 NZLR 347 which discusses this regime, or practice, of using these rent charges, memorandum of encumbrance rent charges as subdivisional type documents for the imposition of covenants or individual imposition of conditions if we call it negative neutrally that the Council are says necessary.

In 15.4, I've already said there's probably is that – my submission is that whether you define this case as a positive or negative covenant, it doesn't really matter. The end result's the same. It is the appellants' submission that

the covenant here does not meet the statutory definition of a positive covenant. I'll come to the statutory definition in a moment but what I say in 15.6 is that, I say that the appellants' submissions are unduly narrow. They ignore the land covenant in its entirety and, as with all the documents and contracts and property document, the interpretation has to look at the entire contents. And here the land covenant was imposing a number of related and interdependent obligations. It goes well beyond just parking – and I've taken you to all those clauses about building and heating and lighting and that sort of – not heating, but lighting and security and so on.

And 15.8, very much an essential part of my submission which is that when you look at this land covenant, it is one that requires an operating carpark for the benefit of Lot 2 and 3, not just suffering.

And then on 15.9, I've tried to work into the statutory definition of a positive covenant what's happening here. So it's positive covenant, to use the definition in section 126, which is in my friend's bundle, tab 1. Yes, perhaps if I could get Your Honours just to have tab 1 in my friend's bundle of documents, section 126, and that provides, in terms of a definition of positive covenant means a covenant whereby the covenantor undertakes to do something in relation to the covenantor's land that would beneficially affect the value of the covenantee's land or the enjoyment of that land by any person occupying it. And so my friends say, one of the problems here, one of the fundamental problems is that this document doesn't fit within that definition of a positive covenant. Well, I say it does, if you read it. A positive covenant means a covenant whereby the covenantor, so quote's not perfect in 15.9 but if we look at the words, "Whereby the covenantor," that's Lot 4, "Undertakes to do something in relation to the covenantor's land," that's Lot 4's land, "ie. to maintain," and I'm using maintain in that wider sense, "And rebuild the carpark." That's what it does. "That will beneficially affect the value/enjoyment of the covenantee's land." Well it does, Lot 2 and 3, by any person occupying it.

So by contrast with my friend, and my friend says, well, in this area one of the major problems is that it can't be a positive covenant because it doesn't meet the definition. I say, yes it does.

And in my submission in 15.11, the obligations here, unlike where you've got just easements. Easements don't generally require activity by the subser – servient tenement. It usually just involves suffering something. Well, here, this requires activity by the covenantor. As well as providing various taxes, it's got to maintain the building and so on. So I say perfectly proper for the Court to have held that it was a positive covenant.

Now I'll just deal with council consent, if I may, at 15.16. The suggestion is, as I understand it, that the problem here is no evidence that the Council consented to this. I'm not sure how serious this proposition is, and the suggestion is, as I understand it, is that the Court couldn't make a declaration because of section 348 which required council consent. I say, firstly, that that was a new point not previously put. It's not really addressed in evidence. But I say it's clearly beyond sensible argument that the Council did consent to these arrangements. It required these arrangements. I go further if you work through the documents.

And section 305, which is referred to. I think it's under tab 2 of my friend's submission, section 305 provides and, again, it's been superseded but it provides in subsection 2 that where the Council has approved a survey plan, it shall fix the seal of the Council. Well, first thing here is – and they say well, look, the covenant's not mentioned there in that document. Well, the drafting of this plan and the consent of the Council was a year before. The deed of covenant here is the first point, so of course it won't. But then you move on anyway and read, "Which shall be conclusive evidence that all roads, private roads, reserves or landed vested in the Council in lieu of reserves and private ways shall have been authorised." What that's saying is that if the survey plan shows something then that's conclusive evidence it's been consented to. What it doesn't say is that if it's not there it's not consented to. So it's not saying – and of course it couldn't, because time moves on, and time moved

on in this case. So if my friend is trying to suggest or if the appellant is trying to suggest that somehow you draw an inference from the document of August 1988 in reliance on subsection, my submission is it's misreading subsection 2.

Now I've said the Court should regard rights, recognise rights in any event, and perhaps I could best help Your Honours now by just taking you through a House of Lords decision on an appeal from Scotland, it's under tab 3 of my bundle, because it contains a lot of, addresses a lot of the issues, in my submission, that have arisen today and arise on this case. Your Honours, tab 3 my bundle, it's *Moncrieff & Anor v Jamieson & Ors*, it's in an appeal from Scotland, and it concerns neighbouring properties in Scotland, one known as Da Store in Shetland – they're both in Shetland – and the other known as The Storehouse, and there are people residing in them. Now the covenant at issue is the – and I'll use the page references at the top right-hand corner there's some page references if Your Honours need to follow, and this is in the judgment of Lord Hope, and it's page 4 of 60 – sorry, we'll go back one page, page 3 of 60, page 3 of 60, paragraph 2, "The situation at the of Da Store is such it has no direct access to the system of public roads that serve the community in that part of Scotland," so it had no access. So among the rights conveyed by the disposition to be enjoyed together with the lands on which the subjects are situated was the following, and this is the wording, the clause in question, "Fourth, a right of access from the branch public road through Sandsound. The branch public road is the road referred to as 'Sandsound public road' in the previous paragraph." So the right in issue was a right of access from the branch public road through Sandsound. It's the inverse of what's happened here. Here the parking right is the fundamental with the ancillary right as being access. But in this case the primary right that was given was a right of access and the question is, as you see in paragraph 3, about halfway down, "It is common ground that the effect of the clause was to confer a servitude right of access to Da Store from Sandsound public road for both pedestrian and vehicular traffic. It is also common ground that accessory to the right of vehicular access is a right to stop vehicles on the servient tenement in order to turn, load and unload goods from them and set

down and pick up passengers, contrast *Baird v Ross* (1836) 14 S 528, in which it was held dominant proprietor was not entitled to load or unload," and so on. "The dispute that has given rise to this litigation is whether there is also an accessory right to park vehicles on the servient tenement." So the servient tenement says, "We accept that there can be a very limited parking stopping to let people off but we don't accept that you can park for a greater period of time." And in paragraph 5 it just refers to, "The Sheriff, Scott Mackenzie", great Scottish name, "pronounced an interlocutor in which, amongst other things, he granted the declaratory that the pursuers were entitled to park vehicles on the servient tenement in the exercise of the rights of accessway," so it's an appeal against that. And page 5 of 60, moving on to paragraph 7, "In the present case," three lines down, "the grant confines itself to a few words only," just those words we had before, "a right of access from the branch public road, the meaning of the and effect of those words must be determined by examining the fact which wee observable on the ground at the time of the grant. Account may also be taken of the use to which the dominant tenement may reasonably be expected to put in the future." So could I just pause on that last sentence, so to apply that to this case you would look at the building and say, "What use might that building, Lot 2, be put to in future years over, forever in fact, in the next hundred years?" and I'd say putting it to residential conversion would have been a contemplated potential use.

Paragraph 12, page 6 of 60, and I think the paragraph numbers probably take us, "The grant was silent as to the route by which access was to be obtain to Da Store from the Sandsound public road," and it refers to a text as they point out, "Institutional authority to the effect grant of servitude is indefinite, the exact route, the dominant proprietor may choose the route over which the servitude is exercisable in any place most commodious for him but not invidiously to the other's detriment," we're still with Lord Hope. And then continuing with Lord Hope at page 9 of 60, the issues, "This issues in this unfortunate case have narrowed since the case was before the sheriff. The defenders do not, as has been said, dispute that the servitude right of access which was constituted by the express grant is a right of both

pedestrian and vehicular access. Before any evidence was led they conceded that it included rights to turn vehicles and to load, continue to dispute the right to park vehicles," and so on. "The first issue," in paragraph 20, "is whether a right to park is ever capable of being constituted as ancillary to an admitted servitude of vehicular access." The first issue is a right to park ever ancillary to the right to access. Second issue is, "Whether the right was constituted in the particular circumstances of this case." Paragraph 21, "Yet to be decided whether a right to park vehicles can be said in Scots law to exist as a servitude in its own right," and over the page there's reference to authorities, probably turn through to paragraph 26, which is still Lord Hope, at page 11, "The proposition for which the pursuers contend that a right of parking may be constituted as a right ancillary to an undoubted right of vehicular access is easier to accommodate within established principles. The essence of a servitude is that it exists for the reasonable and comfortable enjoyment of the dominant tenement. Whether it originates in writing by means of an express grant or is to be inferred from the other provisions not expressly creating a servitude, practical considerations may indicate that it will carry with it the other rights which, although they would not qualify on their own as servitudes, are necessary if the dominant proprietor is to make reasonable and comfortable use of the property in favour of which it was granted." So applying here, if you've got a right to park you've got a necessary right of access. "This is the principle to which the defendants have given effect by their acknowledgement," so there's the acknowledgement. Paragraph 29, page 13 of 60, after referring to *Jones v Pritchard* [1908] 1 Ch 630, 638 Parker J which – well para 29 referred, about halfway down, "In *Jones v Pritchard*," it is often quoted in these cases, "Justice Parker said that the grant of an easement is prima facie, also the grant of such ancillary rights as are reasonably necessary to its exercise and enjoyment." Indeed, that's what the Court of Appeal in short form decided there. Further on in that paragraph –

ELIAS CJ:

What is the point you're taking from this case?

MR KOHLER QC:

Well, several points. I'm just working through it from beginning to end, but several points. This particular point relates to the right of way issue, so what I'm saying in respect of the right of way, Your Honour, is three things. The first that I say the document provides for access to and from the basement anyway, just as a matter of ordinary construction. But in any event I say it's implicit, that's my second proposition. The third proposition is, even if I'm wrong in those two propositions, there is a principle of law which says that if you have a right, ie to park, if you find that the Lot 2 has that right, then it has the ancillary rights that are necessary for the parking right to be enjoyed, and that is what the House is finding here.

ELIAS CJ:

Just slightly, I see that Lord Hope says that Lord Neuberger has referred to the English authorities, and there are some rather strange concepts to our – not to mention terminology, to our eyes, in the Scottish cases, although *Jones v Pritchard* of course, an English case. I just wondered, it doesn't turn on anything peculiarly Scottish?

MR KOHLER QC:

To Scots law no. And you'll find this case being referred to in the standard texts.

ELIAS CJ:

Well, I mean, what's "civiliter" for example, what's that?

WILLIAM YOUNG J:

Would mean a reasonable use.

ELIAS CJ:

And is that a Roman law?

WILLIAM YOUNG J:
Well, yes, but it's an easement is subject to reasonable use. The Law Lords say, the Judges say basically that the law of Scotland and England's the same.

ELIAS CJ:
Okay, thank you, that's the only question I had.

WILLIAM YOUNG J:
Although different expressions are used, I agree.

MR KOHLER QC:
Yes, and you'll find, Your Honour, I think I picked this up from just one of the standard texts, so it's a Hinde or *Brookers* or both probably. And in paragraph 36 Lord Hope, just to pick up what the outcome is – and every case is case-specific of course – para 36, "I would hold in this case, in view of the particular unusually circumstances, the rights ancillary to the express grant of right of access in favour of the dominant tenement," included the right to park vehicles on the servient tenement in so far as that is reasonably incidental.

I still want to continue with this case a little because Their Lordships refer to some other principles which are significant, and Lord Scott's judgment starts at page 18 of 60 and paragraph 45 His Honour starts, Lord Scott that is, with, "This is an interesting case raising some very basic questions about the nature of easements and servitudes and there seems to be no difference relevant to issue," oh, here we are, "between the common law of England and Wales relating to easements and the common law of Scotland."

ELIAS CJ:
Relating to servitudes.

MR KOHLER QC:
Servitudes, yes. And let me just – I will skip through this. Lord Scott at para 52, which is page 24 of 60, "The respondents' claim that the express

grant did carry with it a right to park has been, in the discussion between Your Lordships, considered on two alternative bases. Further, the right to park is a necessary ancillary to the servitudal right of access, although not a servitude in its own right. Secondly, the express grant of the servitudal right of access carried with it an implied grant of the servitude right to park. My Lords, I regard the distinction between the two ways of promoting the respondents' claim to a right to park as, in the case such as the present illusory. If it is reasonably necessary to the enjoyment of the respondents' vehicular right of access that there should be a right to park at or near Da Store gate, the vehicles whereby access is obtained, ie if the suggested test for the acquisition of a parking right ancillary to the servitudal right of access is satisfied, then for the same reason the express grant of that servitudal right would in my opinion justify the implication of a servitudal right to park. Once it is accepted, as it has been throughout, that the 1973 express grant of a right of access to Da Store is to be read as a grant of vehicular right of access as well as a pedestrian one, it is obvious from the geography that the vehicular right of access cannot be enjoyed without the right to park on the servient land at or near Da Store gate," and, I would say, to imply here, "You can't enjoy your parking rights if you can't drive on the accessway to get there."

Over the page, just at the top there, still with Lord Scott, "Da Store must have contemplated," turning to contemplation here, "that the vehicles by means of which access was obtained by those living at Da Store would have to be left parked at or near Da Store gate until they were next needed. Accordingly, a right of parking must accompany the right of vehicular access. Authority for this is to be found both in Scotland and in English case law (see the cases cited by my noble and learned friend, Lord Neuberger) but the conclusion is one that, in the absence of previous authority, would always be impelled by the obvious answer to what the parties must, if they had thought about it, have had in mind as to the manner of exercise of a vehicular right of access to dominant land used or intended to be used for domestic residential purposes but on which it would be impossible to take a vehicle."

A little further on Lord Scott takes us further in terms of some more general principles, so if we could turn to page 29 of 60, and this addresses the more general question, I suppose, of is this right new and, if so, should it be allowed? I suppose I could put it in those terms. Paragraph 59 refers to *London & Blenheim Estates* case applied by the Court of Appeal in *Batchelor v Marlow,* tests would claim, "Would reject the claim to an easement it's exercise would leave the servient owner with no reasonable use to which he could put the servient land, needs some qualification," oh, yes. That's reaching back to that proposition I put to Your Honours a little earlier that in some of the earlier parking cases the Court said, "Well, there's got to be something left over for the servient land," and His Honour's addressing that. And His Honour has this to say, "It would be impossible to assert that there would be no use that could be made by the owner of land over which he had granted parking rights. He could for example," and this is particularly apt in modern 21st-century Auckland and Ponsonby, "build over or under the parking area. He could place advertisement hoardings on the walls. Other possible uses can conjured up. And by what yardstick is it to be decided whether the residual uses of servient land available to its owner are reasonable or sufficient to save his ownership from being illusory? It is not the uncertainty of the test that, in my opinion, is the main problem, it is the test itself." Matter of principle here, "I do not see why a landowner should not grant rights of a servitudal character on his own land to any extent that he wishes. The claim in *Batchelor v Marlow* for an easement to park cars which was a prescriptive claim based over 20 years' use of that strip of land." further on the next page, 30 of 60, "I can think of no reason why, if an area of can accommodate nine cars, the owner of the land should not grant an easement to park nine cars on the land. The servient owner would remain the owner of the land and in possession and control of it. The dominant owner would have the right to station up to nine cars there and, of course, to have access to his nine cars. How could it be said that the law would recognise an easement by allowing the dominant owner to park five or six or seven or eight but not nine? I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land and substitute for it a test which asks

whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land."

Now, turning to – so as a matter of general principle what I'm saying that His Lordship is saying is here, for example, you build over the land because it's a two-storey building, go up, build under it, go down, use it for hoardings and conjure up any or a whole lot of other things. So one's not put off, as it were, by the extent of the grant. Page 36 of 60 has Lord Rodger, and at paragraph 75 he addresses it as a matter of principle, "Looking at the question as a matter of principle, like Lord Scott, I see no reason why a servitude of parking should not be recognised in Scots law," and pretty much the same the next, page 46 of 60, you have Lord Mance at paragraph 101 and 102 effectively agreeing with Lord Hope and Lord Scott and Lord Neuberger adding his support to the proposition that there's no problem with creating these sort of rights and that the greater right carried with it a subservient right to make it so it could be enjoyed. Lord Neuberger to similar effect – perhaps if I could just take you to paragraph 110 at page 48, "As to the second basis, clear authority in English law for the proposition that the grant of an easement is prima facie, also the grant of ancillary rights reasonably necessary to exercise or enjoyment." Paragraph 112, referring to the – and this is quite useful because His Honour puts it in a more general context, so not just the land law context here, paragraph 112, he points out, "Cases where the right is implied is where it's necessary for the comfortable enjoyment or the convenient and comfortable enjoyment," and so on…

GLAZEBROOK J:
So is this submission that this has to equally apply to covenants or is there something different about a covenant?

MR KOHLER QC:
And I'm just about to take you to a passage that says this is part of a more general proposition. I'm saying there's nothing different, and the very point I think Your Honour's putting to me is in paragraph 113, "In fact it appears to me that these two types of cases," this is where you're implying, saying they

necessarily come with subservient rights, “are no more than examples of the application of a general and well-established principle which applies to contracts, whether relating to grants of land or other arrangements. The principle is that the law will imply a term into a contract where, in light of the terms of the contract and the facts known to the parties at the time of the contract, such a term would be regarded as reasonably necessary or obvious to the parties,” and this is case obviously in land law.

You might regard that statement as – “ironic” is the wrong word, but rather powerful from Lord Neuberger who, in the *Marks & Spencer* case is so insistent on and so resistant to imply terms in a general sense. So even as disciplined, as it were, black-letter lawyer as His Honour is, the *Marks & Spencer* decision –

ELIAS CJ:
Well, he has changed his mind in a number of areas, so…

WILLIAM YOUNG J:
But is this any different anyway?

ELIAS CJ:
No, it’s not.

WILLIAM YOUNG J:
It’s got to be reasonably necessary, that's the feature of the case and it strikes him as being material there.

ELIAS CJ:
Yes, that’s the feature, yes, absolutely.

MR KOHLER QC:
Yes. But the text I’ve just taken you to in my submission is putting it into its overall context, ie, it’s simply the application of a more general principle. And – oh, yes, the other thing I would draw your attention to is at page 57 of

this case, and this will take me into Professor Edgeworth's article that my learned friends have put to you, this will neatly take you to that. And Lord Neuberger, and I can cite a number of other authorities to the same effect, says at page 140 – sorry, paragraph 140, page 57 and 60, "At least, as presently advised, I am not satisfied that a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being effectively excluded from the property." Now in terms of the creation of new rights, further on in that paragraph, about two-thirds of the way down, "Citing *Dyce v Hay* in support, the Privy Council," that's in *Attorney-General of Southern Nigeria v John Holt & Company (Liverpool) Ltd* [1915] AC 599, "immediately went on to observe that in considering arguments as to whether a right could be an easement," okay it's talking about easements but the principle applies generally, "the law must adapt itself to the conditions of modern society and trade."

I think that covers most of the things that I thought were of significance. But in my submission much of what Their Lordships cover in that case should be of assistance to Your Honours in this case.

Now in section 16 of, headed, "The Court should recognise in any event," and my learned friends have cited an article by Professor Edgeworth, an Australian journal, "In support of the proposition that the civil lawyer has shied away from creating one-off interests in land." But if Your Honours read the article – and I haven't time to take you through it now – but the thesis of the article is that the Court should not be reluctant to recognise even new interests in land because modern society has moved on, new things are required, and the Torrens system, with the ability to search cheaply and efficiently, gets rid of many of the problems and concerns that Courts historically had. And so the plea of Professor Edgeworth in his article –

ELIAS CJ:

Sorry, I'm probably now losing the thread altogether. But why is it necessary for this to be an interest in land if you're relying on the covenant?

MR KOHLER QC:

Indeed I am. I say it doesn't need to be. This is simply an alternative argument and probably I'm giving it more than I should. But it was simply an alternative argument where my friends were saying, "Well, this could be said to be creating some new interest in land," and one of my alternatives is – in my submission it isn't – but one of my alternatives is, well, so what, is the short answer. If you posed the question this way: should this Court say that you can't create these sorts of rights in New Zealand? In my submission that would be absurd in itself. Certainly the drafters, well-experienced property lawyers, Simpson Grierson, thought they could draft it in this way and did so. But perhaps I've got carried away with my enthusiasm for the article. I've finished this section in 16.8 by saying, by submitting Your Honour, that it would be very odd to the man or woman on the College Hill bus, looking over the congested road parking to vacant Lot 4 to learn that New Zealand Courts have learnedly interpreted the documents at issue here to mean that objectively assessed, the parties objectively assessed, they'd intended an outcome that was so absurd.

Implicit/implied term, the next section deals with implicit and implied term, and what I've suggested is that if the Court was to conclude that at the time of drafting probably the drafters didn't think about de-amalgamation, then you've got to say well, what would they have intended? That comment, that exercise that Lord Neuberger referred to in the *Marks & Spencer* decision, when you sit in the place of the drafter, but the theoretical drafter, not the real people. And what I've suggested is that if you had to imply a term into both the land covenant or encumbrance, but I do this very much as an alternative and the Court of Appeal only did this really in an interpretive way.

Now the next section of these submissions, in some of the cases, *Marks & Spencer*, *Investors Compensation, Zurich* and so on, raise, and Your Honours are probably sick of it in the contractual context, this issue of what's interpretation and what's implication? Where does construction start and finish? And that is what the *Marks & Spencer* case is about. *Marks & Spencer* is about the Court there saying that Lord Hoffmann in

Investors Compensation mixed up interpretation with implication and they are discrete exercises. In my submission they are discrete exercises and the issue of whether something is implicit, as in *Vickery v Waitaki International Limited* [1992] 2 NZLR 58 (CA) that I've referred you to, is in my submission really a matter of construction rather than implication.

In *Vickery,* Your Honours may remember, was a freezing works. It was kept open, I think, to 1989, if memory serves me right. There was industrial trouble there. The plaintiff was the cafeteria lessee who wanted to sell sausage rolls and pies and sandwiches to the workforce and had a long-term lease. The premises closed, so he had no one to sell his pies and sausage rolls and the like to. So the question was whether the Court, it was implicit that the premises would be kept open or whether it enforced the premises to stay or whether it was implicit. That was implicit in the arrangement otherwise it would be a nonsense.

And a very powerful Court, Justice Cooke, Justice Richardson and Justice Gault, held that it was implicit, and that was the express words that they used and in my submission, whether you go down the road of regarding that as a subset of implication, or whether you go down that as a road of construction, really matters not.

Now, I think I have put to Your Honours all that I want to put to you. Unless Your Honours have any questions, I finished, as I said, well before five.

ELIAS CJ:
No, thank you Mr Kohler. Yes Mr Miles.

MR MILES QC:
The first point I want to emphasise is one that my friend emphasised time and again. The longevity of the agreement of the covenant intended to be in perpetuity and, hence, improbable that it was ever intended that anything would be set in concrete. The short answer to that is that if there was a

change in the circumstances of the deal, and you apply to the Court under 317, and the criteria is set out there. The change of circumstances, the change of conditions and I think there's a general one about just any change that might be relevant. So there's nothing in that point.

The appropriate construction of that covenant was that that condition was set in place for the reasons that we have discussed, to enable appropriate parking, which was important to the Council and important to the parties, and to enable access through to Hargreaves Street. And they did it with the conventional method and the requirement of commonality of the ownership was not in the deed, didn't have to be in the deed because it was a fact, and the emphasis was on A and B as well as C in the introduction to the deed.

So first point, the perpetuity argument and the fact that there might be a change of registered proprietors, that's not a reason why one should construe this in the way my friend suggests.

The second point about the change of proprietors, of course there's a recognition in the deed that there's been a change of registered proprietors. What there will not be, though, is a de-coupling of 4 from 2 and 4 from 3. So what a new purchaser has to do if they want Lot 2, they buy Lot 2 and Lot 2's half of Lot 4 and vice versa, so that the condition insisted on by the Council that Lots 2 and part Lot 4, Lots 3 and part Lot 4, remain in the same ownership for the reasons set out in the Council documents.

Now my friend then went on to suggest, or he got some significant advantage from the arrows in the plan annexed to the deed. You'll recall there is an arrow down the bottom there suggesting entry and exit to the basement, and that indicated, he said, that the deed actually meant that it granted rights over Lot 4's rights, we say of course, were there through ownership. But if you go to our key documents and if you go to a plan which I actually haven't taken you to before, but it's tab 13. It was the consent granted by the Council and what they annex to it was a plan prepared by the applicant and the consent

was granted in terms of a plan. It's page 1034 Your Honours. It's the last page of tab 13.

And if you look closely, and you do have to look closely -

O'REGAN J:
Are you supplying a magnifying glass?

MR MILES QC:
If you look at the triangle, the one we've been talking about, just prior to the access way to the basement, you'll see two arrows. One going into the gate for the basement and it's, I think you've got access there, I think, and the other arrow is going down the right of way, down to Hargreaves. So the arrows –

WILLIAM YOUNG J:
Sorry, what page is this?

MR MILES QC:
1034 Sir.

ELIAS CJ:
I can't see the arrow in - I can see the arrow down the right of way.

WILLIAM YOUNG J:
Yes I do, I do. It's not really an arrow is it? It's more of a sort of a curvy line.

MR MILES QC:
Well, it's effectively –

ELIAS CJ:
There does seem to be an arrow going down the right of way.

MR MILES QC:

And do you see the arrow just above it? It swings into the bottom of the basement.

ELIAS CJ:

Well I see a line.

MR MILES QC:

Yes. There's nothing in that. It's simply indicating that the owners of Lot 2 and 3 could get into the parking lot because they owned it and similarly they could get down to Lot – down to Hargreaves because there was a specific easement giving them the right of way.

O'REGAN J:

So does the separation of the titles mean they can no longer get into Hargreaves Street?

MR MILES QC:

Yes, exactly.

WILLIAM YOUNG J:

So who owns the land with the right of way that comes up from Hargreaves Street, is that Lot 4?

MR MILES QC:

No, that's Lot 44.

WILLIAM YOUNG J:

So is there an easement over Lot 44 in favour of both Lots 2 and 3?

MR MILES QC:

Correct, yes.

WILLIAM YOUNG J:

So they can get up to the triangular area, what you call the triangular area?

MR MILES QC:

Well get down really because –

WILLIAM YOUNG J:

Down or up, sorry, because they go the other way.

MR MILES QC:

Yes.

O'REGAN J:

But they can't get from the right of way in Lot 44 to the road that runs up to Lots 2 and 3.

MR MILES QC:

No they can't, no.

O'REGAN J:

They still have to cross Lot 4, don't they?

MR MILES QC:

Because they have to cross, indeed.

O'REGAN J:

Yes.

MR MILES QC:

And you see Lots 2 and 3 have the same problem because they run up against – if you go to the primary deposited plan, which, 11, yes. You see the Lots 3 and 2 have right of ways running down to the left, and specific easements, but they stop short down at, really where Lot 4 runs across and stops them from coming, from getting into Lot 44. So you can't actually do it unless Lots 2 and 3 cut across the triangle and into the right of way.

And that's why the Council was so insistent that commonality of ownership had to be a condition. And that the titles couldn't be de-amalgamated.

O'REGAN J:
Was the Council told of this consequence when they were asked to approve the de-amalgamation?

MR MILES QC:
I think one can be confident it wasn't Your Honour. Yes, it's a depressing business all around, particularly for the Council, but that's what happens these days. Now parking. My friend says well I switched emphasis from parking onto sort of rights of ownership. I didn't at all. If you go, I'll just give you the reference to Hinde at page 624, it cites a raft of cases at footnote 28 which are relevant saying that you can have an easement for parking. And when you go to the relevant paragraphs in *Moncrieff*, and I think my friend cited them, but if you go to I think it was 70, yes, if you go to page 58, paragraph 58 in *Moncrieff*, Their Lordships said, "As to the right to park and the 'ouster' objection, Megarry V-C in *Newman v Jones*, an unreported case in 1982 concerning the right of lessees of a block of 14 flats to park in the grounds of the block, said: 'I feel no hesitation in holding that a right for a landowner to park a car anywhere in a defined area is capable of existing as an easement.'"

Now subsequently in 2000, in England, they began to raise issues of whether you could actually have an easement where there's a permanent carpark or –

ELIAS CJ:
So that the owner is self-excluded.

MR MILES QC:
Yes, quite.

WILLIAM YOUNG J:
You can only read, it's an easement by prescription, isn't it?

MR MILES QC:

Yes –

WILLIAM YOUNG J:

It's really hard to see how that could apply if an owner actually gives a…

MR MILES QC:

Quite, and certainly back in 1989 when this was negotiated, the Council and the lawyers involved clearly considered it, that easements for parking were simply de rigueur. When you look at the title they're riddled with easements for parking. So –

GLAZEBROOK J:

Well, what's the point here though? I can understand the point that you say there wasn't an uncertainty but do you or do you not accept that this gave them the right to park in those areas irrespective of ownership, and excluded the other people from them? So is your argument just in relation to the triangle or are you saying that the covenant didn't give them even the right to park? So if that got to helicopter in –

MR MILES QC:

They're connected.

GLAZEBROOK J:

– or get in through some other means other than over the triangle, ie through the increase in the hole between Lot 2 and Lot 4?

MR MILES QC:

I think they're interconnected, Your Honour. The reason why there was no need for an easement is because the owners of Lots 2 and 3 could –

GLAZEBROOK J:

No, no, I think you misunderstood my point. Do you accept that the covenant can give them the right to park and did?

MR MILES QC:

Yes, in a…

GLAZEBROOK J:

So the only issue whether it also gave them the right of access over the triangle?

MR MILES QC:

Oh, correct, correct.

GLAZEBROOK J:

All right. That's okay.

MR MILES QC:

Yes.

WILLIAM YOUNG J:

Do you accept that they do have a right to park?

MR MILES QC:

Well, no, no, not by – no, I'm sorry. It's a restriction on the – the right to park arises not from the covenant, it arises from ownership of the land. So, I'm sorry, when that comment to Justice Glazebrook suggested that it was the covenant that gave the right, that's not my argument. They had the right. What the covenant did –

ELIAS CJ:

But through ownership?

MR MILES QC:

Through ownership. The covenant merely restricted their rights.

WILLIAM YOUNG J:

Can I suggest to you that it might have been implicit in the 1989 deed that the owners of Lot 4 implicitly promised that they would not use their ownership

rights so as to impede the practical ability of the owners of Lot 2 to park in the designated parks?

MR MILES QC:
Well, there's not a hint of that in the Council documents.

WILLIAM YOUNG J:
No, well, it's just that it would be a breach of the agreement I would have thought if the Lot 3 owners went and parked in the Lot 2 carparks, and thereby prevented the Lot 2 carpark owners using it.

MR MILES QC:
Yes.

WILLIAM YOUNG J:
So might that not suggest that there is a promise by the Lot 4 owners jointly and individually that they will not interfere with, in this case, the right of the Lot 2 owners to park in the designated carparks?

MR MILES QC:
I don't think that follows necessarily at all, Your Honour, because the deed is consistent that there is no need on any normal assessment to imply anything further –

WILLIAM YOUNG J:
Well, there might be, as I suggested before, if the Lot 3 carpark people are early risers and they just use, fill up the ground, get in first and use all the Lot 2 carparks. Now that couldn't be consistent with the deed, could it?

MR MILES QC:
No, it'd be, it's in breach of the deed, and they could sue each other.

WILLIAM YOUNG J:
Yes, and it's in breach because it's a limitation on them, exercising what would otherwise be their rights.

MR MILES QC:

Yes, be their right, exactly.

WILLIAM YOUNG J:

So why isn't there a term, either on the construction of the agreement or implied, that they won't use their rights as owners to stop Lot 2 owners using their allocated carparks?

MR MILES QC:

Well, so long as it's an issue of internal management, then that's –

ELIAS CJ:

Do you mean between owners?

MR MILES QC:

Between owners, then you look at –

WILLIAM YOUNG J:

But this is not just a covenant between the co-owners for the time being of Lot 4, it's a covenant between the co-owners for the time being of Lot 4 with the owners for the time being of Lots 2 and 3.

MR MILES QC:

But they're always the same.

WILLIAM YOUNG J:

So it's not just internal ownership.

MR MILES QC:

No, no, they're all the same, Your Honour.

WILLIAM YOUNG J:

I understand that.

MR MILES QC:

So how –

WILLIAM YOUNG J:

But if it was just internal arrangements couldn't it have just been, as it were, between themselves?

MR MILES QC:

Well, there is a limited arrangement between them, and we find that in the deed.

WILLIAM YOUNG J:

You see, if it is the case that there is an implied term or the contract should be construed in the manner I've indicated, that would actually catch what's happening now, because your clients are trying to use their rights as the legal owner of Lot 4 to stop the Lot 2 owners using the carpark parking spaces allocated to them.

MR MILES QC:

Yes, but again that's entirely consistent with the arrangements in the deed. It is internally consistent, Your Honour, the –

GLAZEBROOK J:

Well, it's not particularly consistent if they can't use them, so they're just stopping them, for no apparent reason they're stopping them using the carparks. Let's assume that Lot 4 belongs to somebody totally different, neither of Lot 2 nor Lot 3 can use the carparks which the Council encumbrance says have to be available for them.

MR MILES QC:

But that would –

GLAZEBROOK J:

But at the same time they have to pay for the carparks and the Lot 4 owners can't exercise any rights over them because they've promised not to.

MR MILES QC:

And they can't charge for it either. But all of that's –

GLAZEBROOK J:

Well, no, but they get the maintenance and if it, if something happens to it they have to put back the carpark in exactly the same state that it was –

MR MILES QC:

Yes, but they making their –

GLAZEBROOK J:

– but they can't use it and neither can anyone else.

MR MILES QC:

I know, so it makes no sense now. But that was directly as a result of the de-amalgamation. It made perfect sense for 16 years. And given that this significant change of circumstances has taken place, and it is a significant change, and the appropriate response is to apply, as in fact my client did, to the District Court, under 317 to remove those obligations, and that's how the litigation began, there's no issue about that. The issue is whether at the time the deal was struck, whether that was absurd, and of course it wasn't, it made complete sense. The Council understood that, the parties understood that. And again –

GLAZEBROOK J:

But the significant change in circumstance you say you apply to remove the covenant, which thereby removes the rights and the obligations obviously of the Lot 2 owners, but in fact doesn't deal with the encumbrance?

MR MILES QC:

No, you'd then have to go back to the Council and say, "The rationale for the encumbrance has now gone."

GLAZEBROOK J:

Well, from the Council's point of view the rationale for the encumbrance hasn't gone because it doesn't have the carparks attached to either Lot 2 or Lot 3.

MR MILES QC:

No, no, but –

GLAZEBROOK J:

But you say that's the Council's fault for allowing de-amalgamation I suppose?

MR MILES QC:

Well, you could certainly say that. But you'd also say that the deals are between the owners, are irrelevant to the Council. Once those requirements set out in the covenant have gone, then it's open to the parties then to negotiate some rational commercial deal, and you'd do that by going back to the Council and working through some principle that would still permit access down through Hargreaves Street but with some appropriate commercial understanding.

WILLIAM YOUNG J:

Can I ask you a question? Is there any evidence as to the price that your client paid for the second half of Lot 4?

MR MILES QC:

Don't know, Sir.

WILLIAM YOUNG J:

I couldn't see any, but perhaps there is. I suspect not a huge amount.

MR MILES QC:

He bought it in 1990 when –

WILLIAM YOUNG J:
No, that's the first half.

MR MILES QC:
No, no, the lots were combined then.

WILLIAM YOUNG J:
But didn't he buy from the receiver…

MR MILES QC:
Oh, I see, the second half. Yes, yes, he did. That was at a mortgagee sale I think or…

WILLIAM YOUNG J:
That was in 2009 I think or 2010.

MR MILES QC:
Yes.

WILLIAM YOUNG J:
Because he was sort of buying a fight.

MR MILES QC:
I don't know, Sir. One suspects in the circumstances not a lot of money would be paid, but I can't help there.

Yes, just on the, back on the plan annexed to the deed at tab 1, you'll remember when we, you know, one of our principle arguments, of course, is one looked at the primary deposited plan to get the conditions, and we looked at the drawing annexed to the deed, and my friend said, well, you know, what does it show. It doesn't tell you anything. At that stage he was specifically looking at the deposited plan. I just wanted to refer both to the drawing annexed to the deed and then take you to tab 11, at the deposited plan. But when you look at the drawing you'll see at the top right there's a specific

reference there for survey and traverse information refer to DP126975 and that's, of course, the deposited plan at tab 11 which contained all the conditions. So when you go to 11 you get all the information that we've subsequently, that we're discussing –

WILLIAM YOUNG J:
So it's DP12257, is that, sorry?

ELIAS CJ:
126975.

MR MILES QC:
126975.

WILLIAM YOUNG J:
Sorry where's that figure. Is it –

MR MILES QC:
126, yes, do you see at the top right?

WILLIAM YOUNG J:
Right, okay.

MR MILES QC:
Does Your Honour see that?

WILLIAM YOUNG J:
Is it DP121257?

GLAZEBROOK J:
DP126975.

MR MILES QC:
It's the top right.

WILLIAM YOUNG J:
Oh I see, sorry. That's tab 11.

MR MILES QC:
And that's tab 11, exactly, with all the information relating to the resolution and the conditions. The reliance, Your Honour, on *Moncrieff* obviously has to be looked at with some scepticism. The connection between Scottish much less English land law is ours has some significant differences. The essential point, of course, under the Torrens system, is that interest in land are registered. It's there for clarity, it's there for certainty, and that's why it is so important that not only are the relevant interests registered, but that they are registered in the appropriate forms, either as easements or as covenants.

The other point with *Moncrieff*, they had an express grant of access. The inference was whether implied in that was a right to park. Well the whole issue we have here is whether there was an express grant of access. None, we say of course of the deed, they had the right anyway. So it's of little significance in dealing with the construction of the documents here.

There is an issue of Council consent, Your Honours. Now I didn't, it's in our written submissions. I didn't refer to it this morning but could I take you on my submissions to 94 because it's important on the issue of the triangle. If you go to submissions, you'll see at 94 where we say, "Section 348 of the Local Government Act 1974 provides that: Except with the prior permission of the Council, no person shall lay out or form any private road or private way, or grant or reserve a right of way over any private way, in the district." That simply means that no one can provide a right of way without the prior permission of a council. What is quite clear is that the Council did not grant a right of way over that triangle. It granted the right of way over Lot 44. So what is implicit here, with my friend's submission, is that a right of way has been extended from those easements coming down on the left-hand side of the property, those easements granting right of ways to Lots 2 and 3, and when they get to the end, as it were, and they can't go any further, the only right they have was then to cross over the triangle and down the right of way,

and you needed a right of way for that, and the Council did not grant it. It's simply illegal.

GLAZEBROOK J:
Well I certainly didn't think that they couldn't cross over the triangle but you'll say that's because of the commonality of ownership condition?

MR MILES QC:
They owned it, yes, exactly Ma'am. So you can't –

GLAZEBROOK J:
I didn't say I agreed with that as a proposition, but that's what you would say no doubt.

MR MILES QC:
Quite.

GLAZEBROOK J:
Because it all comes down, effectively your argument all comes down to the commonality of ownership being the only thing that granted them the rights and the covenant didn't do anything other than have a management of –

MR MILES QC:
Precisely, precisely. And that is exactly, when you look at 13 and 14, the consent from the Council, the two documents recording the base of the application, and the conditions, it is crystal clear that that was what the Council was intending.

GLAZEBROOK J:
There's nothing to stop somebody agreeing that they can have a right of way over the land though, is there? In a private sense, you just can't create it as an interest in land.

MR MILES QC:
Well that's what's being suggested here, that the deed –

GLAZEBROOK J:

Because there's nothing to stop me saying, well, come over my land as much as you like, I'll give you a licence to do that.

MR MILES QC:

Yes, but it's not impossible, it's not registerable.

GLAZEBROOK J:

No, that's right.

WILLIAM YOUNG J:

So but if the effect of the deed was to provide a right over the triangular area, whatever we call it, that was approved by the Council, the deed was approved by the Council which presumably approves everything that's implicit in it. Now whether it would be right to call that a right of way might be a question.

MR MILES QC:

I'm not sure the deed –

ELIAS CJ:

I have a query as to whether the Council approved, say –

MR MILES QC:

I'm not sure the deed was. No, the deed's never been before the Council Your Honour.

WILLIAM YOUNG J:

Okay, the arrangements have been approved by the Council.

MR MILES QC:

When you read the –

WILLIAM YOUNG J:

Right, I understand.

MR MILES QC:

Yes.

O'REGAN J:

Well if the Council approved that plan, and the plan's got that little arrow saying –

MR MILES QC:

Yes, the plan. Absolutely. And the conditions, all the rest.

WILLIAM YOUNG J:

But there was nothing in the deed that the Council didn't know about, was there?

MR MILES QC:

I don't think they cared. It didn't matter to them.

GLAZEBROOK J:

Well they did in the sense that they wanted enough carparks for those two buildings, didn't they?

MR MILES QC:

Yes, and access to Hargreaves Street.

GLAZEBROOK J:

For both of the buildings. So they did care? They couldn't care whether it was 40 for one or 20 for another as long as an aggregate presumably was the same amount.

MR MILES QC:

And who paid for what. They couldn't care about any of that. What they did care about is access to Hargreaves Street as well as off building parking, and the reason they didn't agree the essential right of way, I mean you only have to look at that deposited plan. It's riddled with easements and rights of way. I mean it's a very complicated subdivision. I'm – but it's a very complicated

one, and the designers have gone out of their way to track through precisely all the rights that the dominant and servient tenements had, and they quite specifically did not give them the right to go over there because they owned it, and the Council understood that and that was an integral part of the agreement. So I think this is an insuperable problem, apart from anything else, the fact that the Council has to consent to right of way.

ARNOLD J:

Can I just, something that's slightly puzzled me. If you look at that document under tab 11 in your little bundle, and if you take the second column in from the right-hand side, under that little sort of stamp thing, under the north arrow, there's a little box above the memorandum of easements which says, "Areas marked K, L, R and – "

ELIAS CJ:

Five.

ARNOLD J:

"Five, to be subject to restrictive covenants. For details see survey plan." Now it's a bit hard to figure out but it looks to me as though K, L, S, anyway, related to Lot 4, 5 rather, and if you look at the words "Lot 4" beneath "685" you see a little what looks like a five in a circle, and then if you look over at the left-hand side you see, "Lot 4, K and L." Now is that right? Is that what those areas refer to?

ELIAS CJ:

Where's K and L? Oh I see, K up there and L, I see, yes.

MR MILES QC:

I would defer at the moment, Your Honour, to Mr Herbert on that.

ARNOLD J:

Yes, well, I mean I don't know, I just…

MR MILES QC:

Yes. We've…

GLAZEBROOK J:

So where's the survey plan?

MR MILES QC:

It's a bit easier on, if you go to the next page where we've blown it up, you'll at least see the easements they're talking about.

ARNOLD J:

Yes, yes.

ELIAS CJ:

Where sorry, the blow up one is it?

MR MILES QC:

Yes, tab 12.

ELIAS CJ:

Yes, why didn't we start here Justice Arnold.

ARNOLD J:

Well it actually, that bit doesn't help you. It does give you what looks like the –

ELIAS CJ:

It gives you 5, K and L.

ARNOLD J:

S or 5, whatever it is, S it must be.

MR MILES QC:

S is Lot 4, yes. I think that's not 5, it's an S.

ELIAS CJ:

Oh, I see.

ARNOLD J:

It is an S, yes. It's just the K and the L are not shown but they're on the left-hand side of that one on tab 11, with a little sign saying "Lot 4".

MR MILES QC:

Oh, R, yes.

ARNOLD J:

Well anyway, I mean maybe we can't solve it here, but somebody might have to…

ELIAS CJ:

And M is the right of way?

WILLIAM YOUNG J:

M is the triangular bit.

ELIAS CJ:

Yes, it's a right of way.

ARNOLD J:

Yes, M, the little m. Well there is a right of way over M in favour of Lot 44, and you see that on the right-hand column, on the other one is proposed –

MR MILES QC:

Yes, that's significant because that's in favour of Lot 5.

GLAZEBROOK J:

Oh.

MR MILES QC:

So, because Lot 5 had to get down that right of way. So that is significant because it's very specifically giving a right of way in favour of 5.

GLAZEBROOK J:

So where's the survey plan that shows us the details of the restrictive covenants, that's referred to there?

MR MILES QC:

The only one we've got, Ma'am, is the one that I took you to at 1034 at tab 13.

GLAZEBROOK J:

Although that says it's subject to survey at the top right-hand side, not that I know – so I don't, so that's a survey plan…

MR MILES QC:

Mr Herbert just points out that the drawing at the back of the deed, you know, which I took you to, which had the top right, "For survey and traverse information," you go to DP, the one we're looking at, it's circular. So we're back into the main plan 126975.

GLAZEBROOK J:

What's this – oh, it's the drawing title.

MR MILES QC:

The approvals are based on – yes, if you look at the approvals at the top right, this survey plan, the approvals given on this survey plan are conditional on the granting or reserving of the –

GLAZEBROOK J:

Sorry, where are you?

MR MILES QC:

I'm on tab 11, with the deposited plan.

GLAZEBROOK J:

Yes.

MR MILES QC:

I don't know whether this is the answer, but the approval is, on this survey plan, conditional upon the granting or reserving of the easement shown in the memorandum endorsed. So the condition has been, one of the conditions is that the easements shown there have been approved. They are not specifically recording covenants.

GLAZEBROOK J:

Well, that doesn't help us in terms of what that means, the restrictive covenants, as set out in the details in the survey plan. Unless that does refer to what's actually attached to the deed of covenant.

MR MILES QC:

No, it wouldn't be, Your Honour, because that had nothing to do with the Council.

GLAZEBROOK J:

Well, there's are restrictive covenants.

MR MILES QC:

Yes. But this…

WILLIAM YOUNG J:

But the restrictive covenants hadn't been entered into at this stage, because this is October 1988.

GLAZEBROOK J:

Yes, that's why they say, "To be subject."

WILLIAM YOUNG J:

Ah, right, "To be subject," right, okay.

MR MILES QC:

Yes.

GLAZEBROOK J:

It doesn't say they are subject.

WILLIAM YOUNG J:

Right, okay, sure.

GLAZEBROOK J:

And the one at 13 isn't a survey plan because it actually say, "Subject to survey," so that was what they put up.

MR MILES QC:

Yes, well, it may well reflect the Council's understanding that there would be restrictive covenants entered into between the parties, but they were not going to be shown here.

GLAZEBROOK J:

Well, they required that memorandum of encumbrance.

MR MILES QC:

Maybe Mr Thomas could tell you what he understands the position to be?

ELIAS CJ:

Yes, of course. Although I'm not sure that we're going to get to a final view on this, are we?

MR MILES QC:

No.

ELIAS CJ:

But anyway, if you just walk us through it, Mr Thomas.

MR MILES QC:

We've actually virtually got there.

ELIAS CJ:

Right.

MR KOHLER QC:

Your Honours, I'm a bit concerned we're getting a bit beyond reply, and I'm not sure if Mr Thomas is going to give his personal opinion –

MR MILES QC:

No, he's not going to give his personal opinion.

ELIAS CJ:

Well, you can respond if there is a – we're just being walked through plans, we're not very familiar with them.

MR THOMAS:

Ma'am, the detail on the plan tends to show two things. Because this is a plan that is required to go before the Council, it shows the Council consent conditions, which in this case the consent's given on the basis of easements being created. The second thing a plan, any plan, can do, especially since it's one that has originated from one of the parties, is one of the parties can request the surveyor to note areas to be made the subject of further easements or restrictive covenants that may or may not eventuate in the future. So I think what that means is –

ELIAS CJ:

It's not necessary for Council purposes, which is what this was produced for?

GLAZEBROOK J:

Well, it will be necessary for Council purposes because Council wanted those to be carparks, so they were at the very least requiring that they have a restrictive covenant to say that you can't use them for anything else, you

couldn't set up a shop there, because they are to be used for carparks for Lots 2 and 3. And there's nowhere on this plan that contains that condition, which was an absolutely clear condition of Council, and including that that thereby gave them the exit out to Hargreaves Street.

MR THOMAS:
I think the only thing that I could take from this plan legitimately is that the Council approval is expressly given on the basis of the easements being created. And also on this plan happens to be a note showing that at some time restrictive covenants will be granted, and that's I think all the plan can really show us.

WILLIAM YOUNG J:
Is it not a condition of the Council approval?

GLAZEBROOK J:
It was.

MR THOMAS:
No, it is, Sir.

GLAZEBROOK J:
It certainly was a condition of the approval that it would only be used for carparks, it says so.

WILLIAM YOUNG J:
No, but just reading the document, isn't it expressed as a condition? It's a bit hard – because it's just sitting there.

MR THOMAS:
Just looking at the approvals column, Sir, and if we read that through, the Council consent is expressly given conditional upon the granting or reserving of the easement shown in the memorandum. Then we go to the memorandum of easements panel.

GLAZEBROOK J:

All I was saying is that this doesn't say anything about a condition that Lot 4 has to be used only for carparking for Lots 2 and 3, which was absolutely a condition of the consent.

MR MILES QC:

Yes, but you wouldn't expect that to –

GLAZEBROOK J:

There were two conditions to the consent. One was the commonality of ownership and the other one was that it had to be used for carparks, on page 1032.

MR MILES QC:

Yes, but –

GLAZEBROOK J:

But this plan doesn't have that second condition on it, only the first.

MR MILES QC:

Quite.

GLAZEBROOK J:

But that was being dealt with by way of the memorandum and encumbrance, it didn't need to be, and actually one can't quite see how it could be dealt with other than by way of a memorandum of encumbrance, a restrictive covenant because she certainly didn't have an interest in those carparks.

MR MILES QC:

Exactly, quite.

GLAZEBROOK J:

I'm not sure that that's helped at all but…

MR MILES QC:

Well, that's all I propose to say, unless there's anything more that I can help Your Honours with?

ELIAS CJ:

No, thank you, Mr Miles. Mr Kohler, I don't think there was anything – was there anything that arose there?

MR KOHLER QC:

No, I'm not going to be responsible for keeping Your Honours any later.

ELIAS CJ:

Thank you. Well, thank you, counsel, for your help. We will reserve our decision in the matter.

COURT ADJOURNS: 5.19 PM