IN THE SUPREME COURT OF NEW ZEALAND

SC 21/2008
[2008] NZSC 51

BETWEEN	BIG RIVER PARADISE LIMITED Applicant
AND	ROBIN LANCE CONGREVE, ERICA MARGARET CONGREVE AND THOMAS ALBERT CECIL MURRAY Respondents

Court: Tipping, McGrath and Wilson JJ

Counsel: T G Stapleton for Applicant
G P Curry for Respondents

Judgment: 15 July 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed, with costs of $2,500 to the respondents.

REASONS

[1] The applicant seeks leave to appeal against a judgment of the Court of Appeal.[1] That Court dismissed an appeal by the applicant against a judgment of the High Court holding that a subdivision proposed by the applicant would breach a restrictive covenant in favour of the respondents. The respondents are the trustees of a trust called the Congreve Family Trust.

[2] The covenant reads:

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1 [2008] 2 NZLR 402.

> No subdivision of the Servient Lot shall permit the creation of more than three separate allotments nor permit more than one dwelling to be erected on each such allotment.

[3] The respondent proposes a subdivision into 52 leasehold interests, with each lessee having a lease with a term of less than 30 years and the right to construct a dwelling. Because the term is less than 35 years, the proposed development does not fall within the definition of a "subdivision of land" in s 218(1)(a)(iii) of the Resource Management Act 1991. The applicant submits that, because of this, the covenant does not apply.

[4] This argument failed in the Courts below, and for the reasons set out in the judgments of those Courts it cannot possibly be right. In summary, these reasons were as follows. First, the applicant's approach is contrary to the plain ordinary meaning of the words of the covenant. Secondly, it would defeat the obvious purpose of the covenant of protecting the respondents' land, which is across the Clutha River from that of the applicant, from the consequences of subdivision (in the ordinary sense of the word) of the latter's land. Thirdly, when the covenant was executed in 2001, the definition of "subdivision of land" in the Resource Management Act included leases with a term of more than 20 years. The proposed development therefore came within the definition at the time the covenant was given. In the unlikely event that the parties at that time turned their minds to the Resource Management Act, it would have been to the definition as it then read and not to some unknown future and different meaning.

[5] Even if the applicant's position were seriously arguable, it would not raise any matter of general or public importance, or any matter of general commercial significance.

[6] The application for leave to appeal is therefore refused. The applicant must pay costs of $2,500 to the respondents.

Solicitors:
Evans Henderson Woodbridge, Marton for Applicant
Russell McVeagh, Auckland for Respondents