IN THE SUPREME COURT OF NEW ZEALAND

SC 108/2015
[2016] NZSC 167

BETWEEN	ESCROW HOLDINGS FORTY-ONE LIMITED First Appellant
	KALLINA LIMITED Second Appellant
AND	DISTRICT COURT AT AUCKLAND First Respondent
	BODY CORPORATE 341188 Second Respondent
	GEORGE VICTOR WILKINSON AND JEREMY KAY COLLINGE AND OTHERS Third to Twelfth Respondents
	AUCKLAND COUNCIL Thirteenth Respondent
	CHANG TJUN CHONG AND OTHERS Fourteenth to Thirty-Ninth Respondents

Hearing:	28 June 2016 Further submissions: July and August 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	J G Miles QC, T J Herbert and R P Thomas for Appellants G J Kohler QC and T M Bates for the Second to Twelfth Respondents
Judgment:	20 December 2016

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellants must pay the second to twelfth respondents costs of $25,000 plus reasonable disbursements, to be fixed by the Registrar if necessary. We certify for two counsel.**

REASONS
(Given by Arnold J)

Table of Contents

Introduction

[1] The first and second appellants jointly own a parking building on what is referred to as Lot 4. The first appellant, Escrow Holdings Forty-One Ltd (Escrow), also owns an adjacent lot, referred to as Lot 3. The second respondent, Body Corporate 341188 (the Body Corporate), is the body corporate for a residential unit title development on another adjacent lot, Lot 2. Apart from the District Court at Auckland and the Auckland Council (the Council)[1] (neither of whom took any part in the appeal), the other respondents are proprietors of units in the unit title development. An issue has arisen as to the Body Corporate's rights (if any) to access and use certain parking spaces in the parking building.

[2] The issue arises because when Lot 4 was created, it was owned as to a half interest each by the owners of Lots 2 and 3 and was intended to provide parking for those lots, allocated in accordance with the Council's requirements. A memorandum of encumbrance between the Council and parties who owned Lots 2 and 3 (the

---

[1] References to "the Council" include the Auckland City Council, which was the relevant local authority prior to the formation of the Auckland Council.

encumbrance) and a memorandum of land covenants, to which the owners of Lots 2, 3 and 4 were parties (the deed of covenant or deed), set out the applicable arrangements. The titles to Lot 2 and its half interest in Lot 4 and to Lot 3 and its half interest in Lot 4 were amalgamated.

[3] However, before the unit title development was undertaken on Lot 2, the title to Lot 2 was de-amalgamated from the title to Lot 2's half share in Lot 4, with the result that, eventually, Lot 2 and its half interest in Lot 4 fell into different ownership. That precipitated a dispute between the appellants as the current owners of the two half interests in Lot 4 and the Body Corporate as proprietor of Lot 2 as to the Body Corporate's rights to access and use the parking spaces allocated to it in the parking building. This raised the question of the scope and meaning of the deed of covenant.

[4] Before the split in ownership, the owner of Lot 2 was entitled to go onto Lot 4 and utilise its allocated parking spaces as an incident of its ownership of Lot 4 – it did not need an easement or any similar right. But once the ownership link between Lot 2 and Lot 4 was broken, there was a question as to the basis on which the Body Corporate could go onto Lot 4 and utilise the parking spaces.

[5] In the High Court Peters J found against the unit owners, holding that the deed of covenant did not create positive rights of either access or use.[2] The Court of Appeal overturned her decision.[3] We consider that the Court of Appeal was right to do so. There was no suggestion in argument that the effect of the de-amalgamation of the titles to Lot 2 and Lot 2's half share in Lot 4, or the split in ownership that subsequently occurred, brought the deed of covenant to an end. Rather, the appellants took the view that the deed continued in force and they required the Body Corporate to meet its financial obligations under it. We consider that on a proper interpretation of the deed, the appellants can be prevented from denying the Body Corporate access to and use of Lot 2's allocated parking spaces in the parking building on Lot 4.

---

2 *Body Corporate 341188 v District Court at Auckland* [2014] NZHC 442 [*Body Corporate 341188* (HC)].

3 *Body Corporate 341188 v District Court at Auckland* [2015] NZCA 393, (2015) 16 NZCPR 667 (Ellen France P, Courtney and Kós JJ) [*Body Corporate 341188* (CA)].

[6] This conclusion is based on the application of the deed of covenant to the particular circumstances that have arisen, taking into account relevant statutory provisions. We do not mean to suggest that, as a matter of conveyancing practice, covenants and easements can or should be seen as wholly interchangeable. Our decision simply relates to this deed applied to the circumstances of this case.

Background

[7] Upland Holdings Ltd (Upland) owned a site at what was then 17 Hargreaves Street, College Hill, Auckland. In 1987, the Council granted Upland consent to subdivide the property into three lots, Lots 1, 2 and 3, in order to develop three office buildings. A condition of the subdivision was that a parking easement would be granted over part of Lot 1 in favour of Lot 2.

[8] In 1988, Lakeland Properties Ltd (Lakeland),[4] which had acquired a part interest in Lot 1,[5] applied to divide Lot 1 into two new lots, Lots 4 and 5. Lot 4 was to be used for parking for the occupants of the office buildings on Lots 2 and 3. Lot 5 would contain the third office building. At the same time, a right of way was to be registered on the title of a vacant site on Hargreaves Street, Lot 44, to give access from the back of the lots to Hargreaves Street. The effect of the change was that some of the car parks for the office buildings on Lots 2 and 3 were to be located in the parking building on Lot 4. It was proposed that Lot 4 would be jointly owned by the owners of Lots 2 and 3 as the primary beneficiaries of the arrangement.

[9] The Council approved the further subdivision subject to the condition:

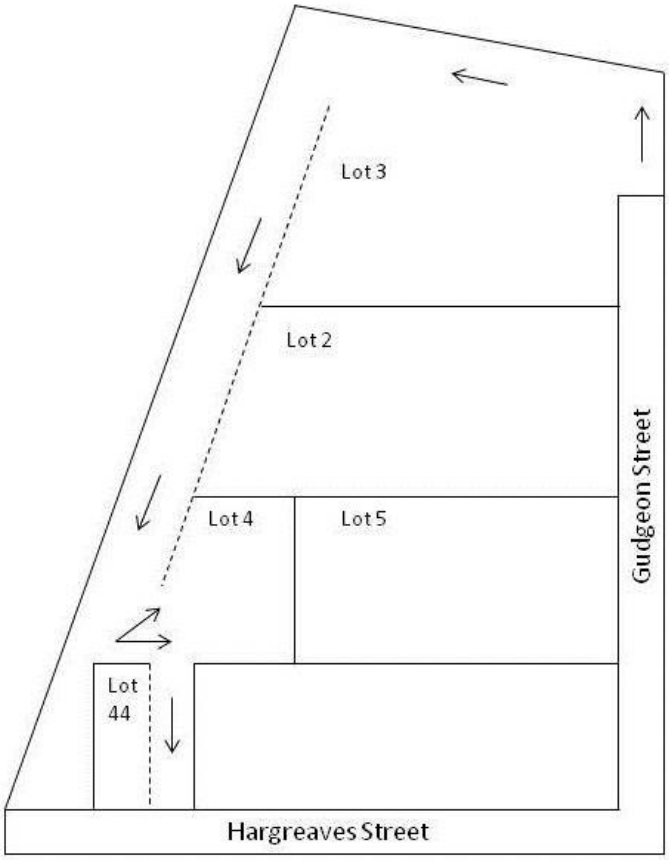
> That proposed Lot 4 … have registered on its title a restriction that is to the satisfaction of the City Solicitor to prevent:
>
> (a) it being used for other than car parking and accessways for the relevant lots concerned (as per submitted plans) without prior consent of Council,
>
> (b) Lot 4 being owned by other than the owners of Lots 2 and 3.

---

4 Lakeland acquired a part interest in Lot 1 from Upland in 1988.

5 Upland and Lakeland held Lot 1 as tenants in common in equal shares.

The Council also required that easements be registered over the part of Lot 4 that was part of a formed driveway running down the side of Lots 2, 3, 4 and across Lot 44 onto Hargreaves Street to permit the owners of Lot 5 and Lot 44 to use it. (The owners of Lots 2 and 3 did not need an easement over this part of the driveway as they were to own Lot 4.) The following diagram provides a simplified illustration of this arrangement.



[10] On 14 August 1989, the encumbrance and the deed of covenant were entered into.

(a) The encumbrance was executed by Upland and Lakeland as owners of Lot 1[6] (which became Lots 4 and 5) and by City Realties (No 6) Ltd (City Realties) as owner of Lot 2 in favour of the Council in consideration for the Council's consent to the subdivision. Under it, the owners encumbered Lot 4 for the benefit of the Council for a term

[6] Upland and Lakeland were also the owners of Lot 3, although that was not noted in the encumbrance.

of 999 years with an annual rent-charge of five cents to be paid if demanded. They covenanted with the Council not to allow Lot 4 to be used "for any purpose other than car parking or access for the benefit of Lots 2 and 3" except with the prior permission of the Council.

(b) The deed of covenant[7] was made between City Realties as the registered proprietor of Lot 2 and of a half share in Lot 4 and Upland and Lakeland as registered proprietors of Lot 3 and of the other half share in Lot 4. Under the deed, the owners of Lots 2 and 3 agreed to meet the operating expenses and outgoings for the car park in the proportions in which they were to have access to parking spaces. As Lot 2 was to have 24 of the 39 parking spaces available, it was to meet a 24/39 share of the expenses, while Lot 3 was to meet a 15/39 share reflecting its entitlement to use the remaining 15 spaces. The owners of Lot 4 covenanted not to allow Lot 4 to be used for any purpose other than car parking for Lots 2 and 3. The deed annexed a plan of the parking building, which consisted of a basement level and an upper level. The plan identified where the car parks for Lots 2 and 3 were to be located. We were advised that the basement area was to be used by Lot 2 and the upper floor by Lot 3.[8]

[11] In accordance with the Council's requirements, the title to one half share in Lot 4 was amalgamated with the title to Lot 2 and the title to the other half share in Lot 4 was amalgamated with the title to Lot 3. The amalgamated certificates of title noted that they were subject to ss 308(4) and (5) of the Local Government Act 1974 (now repealed), which restricted the disposal of Lot 2 (or Lot 3) independently of the relevant half interest in Lot 4 without Council consent. This mechanism gave effect to the Council's requirement that there be a restriction to prevent Lot 4 being owned by other than the owners of Lots 2 and 3.[9] The encumbrance was registered, and the deed of covenant was noted, against the amalgamated titles on 11 December 1989.

---

7 While headed "Memorandum of Land Covenants", the document is a deed.

8 We set out the terms of the land covenant in more detail below at [46] and following.

9 Above at [9].

[12] In November 1990, the first appellant, Escrow, acquired the amalgamated interest in Lot 3 and half of Lot 4. Later, in 2003, Central Strata Management Ltd (CSM) acquired the amalgamated interest in Lot 2 and half of Lot 4. In 2005, CSM made a non-notified subdivision resource consent application to the Council for the amalgamation condition to be cancelled in respect of Lot 2 and its half interest in Lot 4. It claimed that access to Lot 4 for parking for Lot 2 was no longer required as it could accommodate Lot 2's parking requirements entirely on Lot 2. The amalgamation condition was cancelled and two separate titles were issued for Lot 2 and for CSM's half interest in Lot 4.

[13] Lot 2 was then converted into a residential unit title development, now controlled by the Body Corporate. Some unit owners understood that they had acquired rights to use Lot 2's parking spaces in the basement of the parking building on Lot 4, either by acquiring a parking space with their unit or by way of licences issued by CSM or by a subsequent owner of CSM's half interest in Lot 4, Stretchland Ltd. Stretchland's interest in Lot 4 was acquired by the second appellant, Kallina Ltd (Kallina), by way of mortgagee sale. Accordingly, Lot 4 came to be owned as to one half share by Escrow and the other by Kallina, which remains the position. Mr Humphrey O'Leary controls both Escrow and Kallina.

[14] From October 2009, there were discussions between the parties about access to the parking spaces designated for Lot 2 on Lot 4. These discussions did not lead to any agreement, however. The appellants say that they continued to permit the unit owners from Lot 2 to use the relevant car parks on Lot 4 on a "without prejudice" basis. Nevertheless, they carried out extensive work on the parking building and invoiced the Body Corporate for Lot 2's 24/39 share of the cost, in accordance with the deed of covenant. In particular, the Body Corporate was invoiced for:[10]

(a) $55,517.72 in May 2010, principally for the costs of waterproofing;

(b) $5,476.74 in December 2010 for operating expenses;

(c) $13,331.91 in May 2011 for waterproofing costs; and

[10] All of the amounts noted are exclusive of GST.

(d) $5,507.64 in August 2011 for operating expenses.

In addition to these amounts, the Body Corporate paid, as it always had, the cost of electricity supplied to the basement area of the parking building.

[15] The Body Corporate did not pay the first account immediately. The tenor of a notice issued by Kallina in late June 2010 to Lot 2 owners who were parking in the basement of the parking building about that invoice, and of an email from Mr O'Leary to the Body Corporate in mid-August 2010, was that the Body Corporate was liable to pay Lot 2's share of the expenses for Lot 4 under the deed of covenant even though Lot 2 owners had no right to access or use the parking spaces.

[16] In September 2011, Escrow and Kallina filed an originating application in the District Court for an order, pursuant to s 316 of the Property Law Act 2007, extinguishing all the covenants contained in the deed of covenant. They served the Council but did not serve the Body Corporate or apply for directions as to service. Indeed, they advised the Court, through counsel (not Mr Miles QC), that "[t]he proposed extinguishment will not substantially injure any person entitled". In his affidavit in support, Mr O'Leary deposed that it had been confirmed that Lot 2 did not require the use of Lot 4 for car parking and failed to mention the substantial amounts the appellants had obtained from the Body Corporate by way of reimbursement of expenses on Lot 4 in the preceding months. Following receipt of a consent memorandum signed by the appellants and the Council, the District Court made an order extinguishing the covenants.[11] When it learnt of the order in early 2012, the Body Corporate sought copies of the documents lodged with the Court from the appellants' counsel. This request was refused. Then, by letter dated 14 February 2012, the appellants advised the Body Corporate that unit owners could not access the relevant parking spaces on Lot 4 without payment. Kallina rendered an invoice for $3,510 (excluding GST), being the monthly charge for 18 car parks. Unsurprisingly in these circumstances, the Body Corporate sought judicial review of the District Court's order in the present proceeding. Ultimately, the appellants consented to the granting of the application for review and Peters J quashed the

[11] *Escrow Holdings Forty-One Ltd v Auckland Council* DC Auckland CIV-2011-004-2002, 19 October 2011 (Judge Harvey).

extinguishment order.[12] In her principal judgment (at issue in this appeal), Peters J said of this:[13]

> Kallina, Escrow and their counsel had a duty to advise the Court of the [Body Corporate's] interest in the originating application. The Court was misled as a result of their failure to do so. The fact that Escrow and Kallina "have put their hand up", as their counsel put it, acknowledges but does not rectify the omission.

We agree.

[17] In relation to the encumbrance and the deed of covenant, the Body Corporate claimed they were entitled to enforce the covenant and the encumbrance and relevantly sought the following relief:

> 1. Declarations to the effect that [the appellants] have acted and are not entitled to act in breach of Land Covenant CO79599.12 and Memorandum of Encumbrance CO79599.15;
>
> 2. A permanent mandatory injunction requiring that [the appellants]:
>
> (a) Desist from denying the [respondents] access to and the use of the car parks in area "A";[14] and/or
>
> (b) Permit the [respondents] access to and use of the car parks in area "A".

[18] In the alternative, the Body Corporate alleged (a) an implied term; (b) an estoppel; and (c) an equitable easement.

The Courts below

[19] Peters J rejected the Body Corporate's claims. The Judge expressed her conclusions as follows:[15]

> [22] For the reasons set out below, I accept the submission for Escrow and Kallina that the [encumbrance and the deed of covenant] do not

---

12 *Body Corporate 341188 v District Court at Auckland* [2012] NZHC 2301. This background accounts for the presence of the Council and the District Court as respondents in this proceeding, though neither participated in the hearing.

13 *Body Corporate 341188* (HC), above n 2, at [66].

14 The reference to area "A" is a reference to the basement area of the parking building which was marked "A" on a plan annexed to the deed of covenant.

15 *Body Corporate 341188* (HC), above n 2.

> expressly or by implication confer on the unit owners a right to use [the designated parking area] or to the required right of way. To the extent owners of Lot 2 have previously enjoyed those rights, they have done so as a result of their ownership of an undivided one half share in Lot 4.
>
> [23] The [encumbrance and the deed of covenant] do, however, remain binding on the parties as successors in title. An important aspect of this conclusion is that the successor in title to Lot 2 has a right to restrain any use of Lot 4, or parts thereof, that is other than in accordance with the [encumbrance and the deed of covenant].

[20] In relation to the encumbrance, Peters J considered that it did not confer on the owners of Lots 2 and 3 a positive right of either accessing or parking on Lot 4.[16] The Judge held that the registered proprietors of Lot 4 could not use Lot 4 other than for the car parking or access, as provided for in cl 2 of the encumbrance, without the prior consent of the Council.[17] Accordingly, it would be a breach of the encumbrance for Escrow and Kallina to permit Lot 4 to be used for car parking or access by parties other than the owners of Lots 2 and 3.[18] Further, the effect of the encumbrance was that the appellants could be restrained from making car parking available only to the owner of Lot 3 while refusing car parking to the owner of Lot 2.[19]

[21] In relation to the deed of covenant, Peters J held:[20]

> [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 to each of Lots 2 and 3 with a half share in Lot 4.
>
> [89] I accept the submission of counsel for Escrow and Kallina that the rights of a registered proprietor of a fee simple title, such as the fee simple of an undivided half share in Lot 4, would include a right to travel over the land and to park anywhere thereon.
>
> [90] The registered proprietors of Lot 2 enjoyed these rights as an incident of their fee simple title to a share in Lot 4 until 2006. The position changed as a result of the de-amalgamation initiated by CSM and CSM's subsequent transfer of its one half share in Lot 4. Thereafter successors in title in respect of Lot 2, including the licencees, could only use the Carpark by a lease or licence from the registered proprietor(s) of Lot 4.

---

16 At [72].
17 At [72].
18 At [73].
19 At [74].
20 Footnote omitted.

[22] The Court of Appeal overturned the decision of Peters J.[21] The Court began its reasoning by discussing the approach to be taken to interpreting the encumbrance and the deed of covenant. It noted that there are divergent views on the extent to which extrinsic evidence may be taken into account when interpreting instruments registered against a title but considered that this was not an issue they needed to resolve as they considered that the deed had an ordinary and natural meaning.[22] The Court said, however, that the encumbrance and the deed had to be read together, against the background of the Land Transfer Act 1952 and the Property Law Act 2007.[23]

[23] The Court then discussed the development of the law concerning covenants in respect to land before turning to consider whether the deed of covenant was negative or positive in nature.[24] Interpreting the deed in the context of the original joint ownership of Lot 4 by the owners of Lots 2 and 3 and against the background of the encumbrance, the Court of Appeal was satisfied that the deed was, in substance, a positive covenant.[25] The Court identified four considerations as supporting this view:

(a) First, cl 3 of the deed of covenant,[26] which regulates the use of the car parks, while negative in form has a natural and ordinary meaning that is positive.[27]

(b) Second, cl 3 has to be read in the context of the other covenants made by the Lot 4 owners, in particular the positive obligations imposed on them to meet costs in respect of the maintenance and repair of the car park.[28]

---

21 *Body Corporate 341188* (CA), above n 3.
22 At [21].
23 At [22].
24 At [23]–[30].
25 At [45]–[52].
26 Quoted in full at [48] below.
27 At [46].
28 At [47].

(c) Third, there is no commercial purpose unless the covenants in the deed are interpreted as a whole as imposing positive obligations. As the Court put it:[29]

> [T]here is no commercial purpose in the owners of Lot 4 incurring obligations to keep the building in good repair and make good damage to it if they do not have to allow it to be used. There is no commercial purpose in the owners of Lots 2 and 3 agreeing to meet the costs associated with the car park if they do not receive any rights to use it.

(d) Fourth, while the encumbrance did not purport to confer positive rights on the owners of Lots 2 and 3, it contemplates that such rights would be conferred.[30]

[24] The Court concluded that it was satisfied that:[31]

> … the purpose of the covenant was to confer on the owners of Lots 2 and 3 the right to use Lot 4 for parking 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. It is implicit that this right carries with it the right to use the access-ways in and out of the car park.

Basis of appeal

[25] In brief, the appellants submitted that the Court of Appeal had failed to give effect to the plain language of cl 3 of the deed of covenant, which is negative and does not confer positive rights. They argued that there was no intention on the part of the parties to grant positive rights of access and use as such rights were unnecessary given that the owners of Lots 2 and 3 owned Lot 4 as tenants in common. Rather, the deed of covenant was simply an agreement between the owners of Lot 4 for the management of the parking facility. Further, the appellants contended that the Court of Appeal had interpreted the deed of covenant as providing positive rights that could only be granted by way of easement, particularly the right to go onto Lot 4. Accordingly, it was argued, the Court of Appeal's judgment "throws into confusion the conventional conceptual distinction between a covenant and an easement." The appellants said that following the de-amalgamation of Lot 2

---

29 At [50].
30 At [51].
31 At [52].

and its half interest in Lot 4 and the sale of that half interest in Lot 4, the owners of Lot 2 had no rights to come onto Lot 4 – indeed, they had no ability to use the driveway exiting onto Hargreaves Street as they had no right to cross the portion of it that was on Lot 4.

[26] For their part, the respondents essentially supported the reasoning of the Court of Appeal, arguing that the appellants' criticisms of its reasoning were unsustainable.

The legal context

[27] In *Keppell v Bailey* the lessees of an ironworks covenanted with the owners of a railway and lime quarry that for as long as they occupied the leased land they would buy all their limestone from the quarry and carry it on the railway to their works at a specified rate.[32] The covenant was expressed to bind their successors and assigns. The railway owners sought to enforce the covenant against a purchaser of the ironworks who had notice of the covenant. It was held that the covenant did not run with the land so as to bind assignees at law and that equity would not give greater recognition to the covenant than the law allowed, even though the purchaser had notice of it. Lord Brougham LC said:[33]

> There are certain known incidents to property and its enjoyment; among others, certain [burdens] wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognised by the law. … All these kinds of property, however, all these holdings, are well known to the law and familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both the science of the law and to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.

---

32 *Keppell v Bailey* (1834) 2 My & K 517, 39 ER 1042 (Ch).
33 At 535–536.

[28] As Professor Brendan Edgeworth notes, *Keppell v Bailey* is an influential early statement of the *numerus clausus* principle, to the effect that the categories of interests in land are closed, so that new interests cannot be created or existing interests "customised" by individual land owners to suit their needs.[34] The appellants, and some commentators, argue that the decision of the Court of Appeal in the present case offends against this principle.[35]

[29] A restricted approach of the kind articulated in *Keppell v Bailey* is readily understandable in view of the fact that there was no effective system for the registration of interests in land at the time – in the absence of a system of registration, permitting a proliferation of interests in land would have created considerable uncertainty and greatly increased the transaction costs associated with dealing in land. Such an approach may be less understandable where there is a comprehensive system of land registration which provides for notification of covenants on titles.

[30] As Professor Edgeworth also notes, however, the principle was not universally accepted even in the mid-1800s.[36] In *Tulk v Moxhay* the owner of several houses on Leicester Square in London sold an adjacent plot on which there was a gated garden.[37] He entered into a covenant with the purchaser that the purchaser, his heirs and assigns would keep and maintain the garden and allow the vendor's tenants in Leicester Square to use it for a reasonable fee. A subsequent purchaser, who knew of the covenant, indicated that he might wish to change the plot's use and build on it. The question was whether the vendor could obtain an injunction to prevent him doing so. It was held that the vendor was entitled to an injunction. Lord Cottenham LC said:[38]

> It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a

---

34 Brendan Edgeworth "The *Numerus Clausus* Principle In Contemporary Australian Property Law" (2006) 32 Monash L R 387 at 392. We acknowledge our debt to Professor Edgeworth's illuminating discussion.

35 See, for example, Thomas Gibbons "Encumbrances, covenants and property rights" [2016] NZLJ 157.

36 Edgeworth, above n 34, at 395–399.

37 *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143 (Ch).

38 At 777–778.

> manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

As to *Keppell v Bailey*, Lord Cottenham said:[39]

> With respect to the observations of Lord Brougham in *Keppell v Bailey*, he never could have meant to lay down that this Court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

[31] It may be, as Professor Edgeworth argues, that the recognition of the status of freehold covenants by the Court in *Tulk v Moxhay* is explained by the need at that time for property law "to provide mechanisms to protect the character, amenity and condition of property, and to safeguard the integrity of wider neighbourhoods."[40] He writes:[41]

> By creating these novel proprietary tools, property law offered a valuable regulatory mechanism to restrain environmental degradation, to salvage heritage buildings from demolition or re-development and to preserve the identity and character of urban neighbourhoods by means of private agreement. The importance of such a new property right had been articulated by the Real Property Commissioners not long before *Tulk v Moxhay* in their 1832 Report, where they specifically recommended legislation to allow freehold covenants to run with land. *Tulk v Moxhay* can therefore be seen as judicial endorsement of that legislative proposal at a time when statutory regulation of urban planning was virtually non-existent.

[32] Whatever the position, the principle established by *Tulk v Moxhay* was ultimately limited to negative covenants benefitting particular land. Hence it became important for the courts to distinguish between negative covenants, which ran with the land, and positive covenants, which did not.[42] A further limitation on the principle was that it only applied where the covenantee owned land which benefitted from the covenant, that is, it did not apply to covenants in gross.[43] To make covenants in gross enforceable something additional was needed, such as an

---

39 At 779.

40 Edgeworth, above n 34, at 398.

41 At 398. (Footnotes omitted.)

42 For the approach adopted, see, for example, *Shepherd Homes Ltd v Sandham (No 2)* [1971] 1 WLR 1062 (Ch) at 1067.

43 *London County Council v Allen* [1914] 3 KB 642 (CA).

encumbrance,[44] which presumably explains why the Council required the use of an encumbrance in respect of the covenants it required in respect of Lot 4 to approve the subdivision.

[33] In New Zealand, development of the law in this area has not been left to the courts. In particular, s 126 of the Property Law Act 1952 allowed restrictive covenants to be noted on the certificate of title of the burdened land where the benefit was intended to be annexed to other land (the benefitted land); an amendment enacted in 1986 extended this by permitting the burden of positive covenants to run with the burdened land.[45]

[34] There are a number of provisions in the current legislation, the Property Law Act 2007, dealing with covenants. For present purposes, we mention only ss 4, 303 and 307 (ss 303 and 307 replace, respectively, ss 64A and 126A of the Property Law Act 1952, which were in force when the deed of covenant was made; although differently drafted, they are relevantly to the same effect).

[35] "Covenant" is relevantly defined in s 4 as "a promise express or implied in an instrument". The word "instrument" is broadly defined, but it is in any event plain that the deed is an instrument. The term "positive covenant" is defined to mean:

> a covenant, including an express or implied covenant in an easement, under which 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 the covenantee's land by any person occupying it.

[36] Section 303 provides:

> **303 Legal effect of covenants running with land**
>
> (1) This section applies to a restrictive covenant, and also to a positive covenant coming into operation on or after 1 January 1987 (which is the application date specified in section 64A(6) of the Property Law

---

[44] See *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [51] per William Young J; *Jackson Mews Management Ltd v Menere* [2009] NZCA 563, [2010] 2 NZLR 347 (leave to appeal to the Supreme Court refused: [2010] NZSC 39, [2010] 2 NZLR 361).

[45] By s 4 of the Property Law Amendment Act 1986, s 126 was repealed and new provisions, ss 126–126G, were inserted. Section 126A dealt with the notification of positive and restrictive covenants relating to land.

Act 1952, as inserted by section 3 of the Property Law Amendment Act 1986), in either case whether expressed in an instrument or implied by this Act or any other enactment in an instrument, if—

(a) the covenant burdens land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land; and

(b) there is no privity of estate between the covenantor and the covenantee.

(2) Every covenant to which this section applies, unless a contrary intention appears, is binding in equity on—

(a) every person who becomes the owner of the burdened land (whether by acquisition from the covenantor or from any of the covenantor's successors in title, and whether or not for valuable consideration, and whether by operation of law or otherwise); and

(b) every person who is for the time being the occupier of the burdened land.

(3) Every covenant to which this section applies, unless a contrary intention appears, ceases to be binding on a person referred to in subsection (2) when that person ceases to be the owner or the occupier of the burdened land but without prejudice to that person's liability for any breach of the covenant arising before that person ceased to be the owner or occupier of the land.

(4) For the purposes of this section, a contrary intention must appear in the instrument in which the covenant is expressed or implied.

(5) This section overrides any other rule of law or equity, but is subject to sections 304 to 306.

Accordingly, relevantly to the present case, the covenants in the deed, both positive and negative, are capable of running with the land and are binding in equity. They are equitable interests in land and can be enforced by way of equitable remedies.

[37] Section 307 provides:

307 Notification of covenants

(1) This section applies to a covenant that—

(a) is a positive covenant or a restrictive covenant; and

(b) burdens land under the Land Transfer Act 1952; and

(c) benefits other land (whether under that Act or not); and

(d) is expressed in an instrument coming into operation on or after the relevant date.

(2) **Relevant date**, in subsection (1)(d), means,—

(a) for a restrictive covenant, 1 January 1953 (which is the date on which the Property Law Act 1952 came into force); and

(b) for a positive covenant, 1 January 1987 (which is the application date specified in section 64A(6) of the Property Law Act 1952, as inserted by section 3 of the Property Law Amendment Act 1986).

(3) The Registrar-General may enter in the register (as defined in section 2 of the Land Transfer Act 1952) relating to the burdened land, the benefited land, or both, a notification of all or any of the following:

(a) a covenant to which this section applies:

(b) an instrument purporting to affect the operation of a covenant notified under paragraph (a):

(c) a modification or revocation of a covenant notified under paragraph (a).

(4) A covenant notified under subsection (3) is an interest notified on the register relating to the burdened land for the purposes of section 62 of the Land Transfer Act 1952.

(5) Notification of a covenant under subsection (3) makes the covenant an interest of the kind specified in subsection (4), but does not in any other way give the covenant any greater operation than it would otherwise have.

(6) **Covenant**, in subsections (4) and (5), includes an instrument purporting to modify the operation, and a modification or revocation, of a covenant notified under subsection (3)(a).

[38] Accordingly, a positive or negative covenant may be noted on the register in relation to the burdened land, the benefitted land or both. A covenant so notified is an interest notified on the register relating to the burdened land for the purposes of s 62 of the Land Transfer Act 1952. That section provides:

62 Estate of registered proprietor paramount

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to

> such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,—
>
> (a) except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
>
> (b) except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
>
> (c) except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

The practical effect of this is that where there is a covenant noted against the title to a property:

(a) the registered proprietor will hold the land subject to the covenant (except in the case of fraud); and

(b) a purchaser of the land will have either constructive or actual notice of the covenant.

[39] The short point to be taken from this brief account is that judicial and statutory developments over time have given greater recognition to the role of covenants in relation to land. As a leading land law text observes:[46]

> While easements remain distinct forms of legal and equitable rights, the tendency of modern statutory provisions has been to bring easements and covenants closer together.

[40] Against this background, we turn to consider the interpretation of the deed of covenant.

---

[46] Tom Bennion and others *New Zealand Land Law* (2nd ed, Thomson Reuters, Wellington, 2009) at [10.16.01]. For discussion of the development of the law in relation to covenants in New Zealand, see also D W McMorland *McMorland on Easements, Covenants and Licences* (3rd ed LexisNexis, Wellington, 2015) at ch 17.

Interpretation of the deed of covenant

The principles

[41] The parties made submissions on the approach to be taken to the interpretation of documents on a public register, in particular on the question of the relevance of evidence of the background knowledge that would reasonably have been available to the parties. This contentious issue was discussed by the Court of Appeal in *Big River Paradise Ltd v Congreve* in the context of the interpretation of a restrictive covenant.[47] There the Court of Appeal discussed the decision of the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd*,[48] expressing the view that, if that decision meant that what might otherwise be relevant extrinsic evidence should be ignored when interpreting a registered easement, it was "open to question" whether it should be applied in New Zealand.[49]

[42] As is apparent from the Court of Appeal's judgment in *Big River Paradise Ltd* and as Don McMorland has recently discussed, this is an issue of some complexity, raising a number of difficult policy considerations.[50] Moreover, since the decision in *Big River Paradise Ltd*, a majority of this Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* has accepted that there may be situations where the fact that a document was intended to be relied upon by third parties not involved in its drafting will mean that extrinsic background material is of diminished relevance to its interpretation.[51] The example given was a security trust deed.

[43] Ultimately, however, like the Court of Appeal, we think the present case can be determined without resolving this issue.[52] We do not consider that any detailed resort to extrinsic material is necessary. Rather, we consider that the case can be resolved by considering the circumstances which the encumbrance and the deed of covenant reveal and the language of the deed read in context.

---

47 *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402.

48 *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 233 CLR 528.

49 *Big River Paradise Ltd v Congreve*, above n 47, at [19].

50 Don McMorland "The Interpretation of Registered Instruments" [2016] NZLJ 166. See also Simon Connell "Admissibility or weight?" [2016] NZLJ 304.

51 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [62] per McGrath, Glazebrook and Arnold JJ.

52 *Body Corporate 341188* (CA), above n 3, at [21].

The deed

[44] To recapitulate, after the de-amalgamation of Lots 2 and 4 the position was:

(a) The encumbrance and the deed of covenant remained on the title for the de-amalgamated half share of Lot 4 (owned by Kallina) and on the amalgamated title for Lot 3 and the other half share of Lot 4 (owned by Escrow).

(b) The deed of covenant remained on the title for the de-amalgamated Lot 2, even after the unit titles were issued and the Body Corporate became the owner of the common property.

[45] Obviously, the encumbrance was designed to ensure that the Council's requirements concerning the provision of parking were met. The owners of Lots 2 and 3[53] (who were together to be the owners of Lot 4) undertook not to allow Lot 4 to be used "for any purpose other than car parking or access for the benefit of Lots 2 and 3" without the Council's prior permission. Like the Court of Appeal, we consider that the deed of covenant was the mechanism adopted by the owners of Lots 2 and 3 to give effect to their obligations to the Council under the encumbrance.[54] In summary, under the deed, the covenantor is the registered proprietor of Lot 2 and one undivided half share of Lot 4; the covenantee is the registered proprietor of Lot 3 and the other undivided half share of Lot 4.[55] (Under cl 12 of the deed, the expressions "covenantor" and "covenantee" include successors in title.) Clauses 1 and 2 impose an obligation (expressed to be perpetual) on the registered proprietors (from time to time) of Lots 2 and 3 to pay, respectively, a 24/39 share and a 15/39 share of the operating expenses of the parking building. The number of parking spaces allotted to the owners of Lots 2 and 3 corresponds to the Council's requirements and implements the "for the benefit of" language in the encumbrance. Clauses 3 to 10 impose obligations on the registered proprietor(s) (from time to time) of Lot 4 as to the use, occupation and upkeep (including paying insurance, rates and so on) of the facility. As we discuss further below, clause 3

---

53 As noted at [10](a) and n 6 above, Upland and Lakeland executed the encumbrance as the owners of Lot 1 but they were also the owners of Lot 3.

54 *Body Corporate 341188* (CA), above n 3, at [23].

55 As previously noted, there were originally two owners of Lot 3, Lakeland and Upland.

gives effect to the encumbrance by limiting the use of Lot 4 to providing parking for Lots 2 and 3.[56] Clause 11 is an arbitration provision. A plan annexed to the deed identifies the areas of the facility set aside for parking for Lot 2 and for Lot 3 and shows the means of entry to, and exit from, the facility.

[46] To explain the deed of covenant in more detail, Recitals A and B recorded that the parties were the owner of Lot 2 and a half share in Lot 4 and the owner of Lot 3 and the other half share in Lot 4. Recital C provided that the parties wished to register certain land covenants pursuant to s 126A[57] of the Property Law Act 1952 "for the good management of the whole of … Lot 4". The appellants argued that this showed the deed was simply an arrangement between the owners of Lot 4 in which the Council had no interest. Clauses 1 and 2 impose perpetual obligations on the proprietors of Lot 2 and Lot 3 respectively. By way of example, the obligation of the proprietor of Lot 2 is described in the following terms:

> THE COVENANTOR BEING THE REGISTERED PRORIETOR OF LOT 2 [AND THE COVENATOR'S SHARE OF LOT 4][58] HEREBY COVENANTS TO THE INTENT THAT LOT 2 SHALL BE FOREVER SUBJECT TO THESE COVENANTS AND THESE COVENANTS SHALL BE FOREVER APPURTENANT TO LOT 3 AND THE COVENANTEE'S SHARE OF LOT 4 AS FOLLOWS:

Clause 1 then provides:

> 1. Operating Expenses and Outgoings
>
> 1.1 The registered proprietor from time to time of Lot 2 shall pay a 24/39 share of the operating expenses of the Carpark comprising the total sum of all rates, taxes (except as excluded in subparagraph (a)), costs and expenses properly or reasonably assessed or assessable, paid or payable or otherwise incurred including goods and services tax assessed thereon in respect of the Carpark and in respect of the control, management and maintenance of the Carpark or in the use or occupation of the same and without limiting the generality of the forgoing shall include:

The clause goes on to list 11 categories of cost, before concluding:

---

[56] See below at [48]–[49].

[57] The deed referred to "s 126(a)" but it was accepted that this was intended to be a reference to s 126A.

[58] These words were inserted in the executed deed. There is no equivalent insertion in the corresponding paragraph in relation to Lot 3's owner.

1.2 Should any operating costs or outgoings be incurred for repairs, maintenance or reconstruction to the Carpark as a result of the negligence or wilful act of the registered proprietor from time to time of Lot 2 or its servants, agents, or invitees then in any such event such registered proprietor shall pay the whole of the cost of such repairs, maintenance, or reconstruction work.

[47] Clause 2 imposed mirror obligations on the owner of Lot 3.

[48] Clauses 3–11 impose perpetual obligations on the registered proprietor(s) of Lot 4, in the following terms:

> THE COVENANTOR AND THE COVENANTEE BEING THE REGISTERED PROPRIETOR OF LOT 4 AS TENANTS IN COMMON AS TO AN UNDIVIDED ONE HALF SHARE EACH DO HEREBY COVENANT TO THE INTENT THAT LOT 4 SHALL BE FOREVER SUBJECT TO THESE COVENANTS AND COVENANTS SHALL BE FOREVER APPURTENANT TO LOT 2 AND LOT 3 AS FOLLOWS:

Clause 3.1 then provides:

> 3. Use
>
> 3.1 The registered proprietor(s) from time to time of Lot 4 subject only as herein expressly mentioned shall not use or occupy nor shall they permit any person other than the registered proprietor from time to time of Lot 2 to use or occupy for any purposes whatsoever that part of the Carpark shown on the attached plan as "A" being "Carparks of Lot 2" AND FURTHER shall not use or occupy nor shall they permit any person other than the registered proprietor from time to time of Lot 3 to use or occupy for any purposes whatsoever that part of the Carpark shown on the attached plan "B" "C" "D" and "E" as being "Carparks for Lot 3" AND FURTHER shall not use or occupy nor shall they permit any person to use or occupy the part of the Carpark shown on the attached plan as "F" and "G" as "Carpark Access" except for the purposes of reasonable vehicular and pedestrian access and egress by any person having the lawful use thereof.

[49] Two features of this clause require emphasis. First, the clause refers to the attached plans of the basement and top level of the parking building showing where the car parks for the owners of Lots 2 and 3 were to be located. To the extent that the deed limited the use of the building to providing identified parking spaces for the owners of Lots 2 and 3, the covenant gave effect to the Council's requirements. Second, cl 3 protects the driveway leading into the basement by providing that the owners of Lot 4 would not allow anyone to use it other than those entitled to utilise

the parking spaces, which in practical terms meant the owners of Lot 2. Since the basement level was allocated principally to Lot 2, mainly vehicles from Lot 2 were entitled to use the entrance/exit to the basement as a matter of course (the upper level having its own means of vehicular ingress/egress onto the driveway running down to Hargreaves Street).

[50] Clauses 8, 9 and 10 provide:

> 8. Destruction of Carpark
>
> 8.1 In the event of any improvements erected on Lot 4 being destroyed or damaged by fire earthquake or from any cause whatsoever the registered proprietor(s) from time to time of Lot 4 shall with all reasonable despatch repair and make good such destruction or damage in a proper and workmanlike manner and the cost of doing so shall be borne by the registered proprietor(s) from time to time of Lot 4.
>
> 9. Default
>
> 9.1 That in the case of default by the registered proprietor(s) from time to time of Lot 4 at any time in the observance or performance of any of the covenants herein contained it shall be lawful for but not obligatory upon the registered proprietor(s) from time to time of Lot 2 or Lot 3 (but without prejudice to any of their other rights powers or remedies) at the cost and expense of the registered proprietor(s) from time to time of Lot 4 in all things to pay all or any moneys and to do and perform all or any act or things which are reasonably necessary for the full or partial performance or observance of such covenants or any of them AND the registered proprietor(s) from time to time of Lot 4 will immediately on demand pay to the registered proprietor from time to time of Lot 2 or Lot 3 (whichever has expended such monies) all money so paid and the costs charges and expenses associated therewith and until such payment the same shall be treated as an advance and shall bear interest at the rate 4 per cent above the Bank of New Zealand base rate for advances on current account from time to time computed from the date or respective dates of such moneys being expended until payment thereof.
>
> 10. Payment of outgoings etc
>
> 10.1 The registered proprietor(s) of Lot 4 shall always be jointly and severally liable for the liabilities and obligations cast on them by this memorandum BUT NEVERTHELESS they shall be entitled to reimbursement of such outgoings and other expenses incurred in relation thereto in the following shares:
>
> Lot 2 – 24/39 share
>
> Lot 3 – 15/39 share

as provided in clause 1 and 2 above.

[51] We make two further points about the deed of covenant. First, although there was common ownership of Lot 2 and a half share of Lot 4 on the one hand and of Lot 3 and the remaining half share in Lot 4 on the other when the deed was entered into, the language of the deed does not require such commonality of ownership or even assume that it will continue. The deed distinguishes clearly between the responsibilities/powers of the registered proprietor(s) from time to time of:

(a) Lot 2 – see cl 1;

(b) Lot 3 – see cl 2; and

(c) Lot 4 – see cls 3–8.

This "individualisation" of obligations is further illustrated by cls 9 and 10, which differentiate internally between the responsibilities/powers of the owner(s) of Lot 2, the owner(s) of Lot 3 and the owner(s) of Lot 4. The deed consistently uses singular and plural language – for example, the "registered proprietor(s)" of Lot 4. Given that the deed was expressed to be perpetual, these features suggest that the deed was intended to remain operative even if there was a change in the commonality of ownership. Accordingly, as a matter of language, the ownership situation that has arisen is capable of being accommodated within the terms of the deed.

[52] If it had been intended that the deed would terminate in the event of either title de-amalgamation or a change in the commonality of ownership between Lot 2 (or Lot 3) and the relevant half interest in Lot 4, the deed could easily have said so. But it did not. Moreover, the encumbrance required that Lot 4 be used only for parking for Lots 2 and 3 – it did not require commonality of ownership. The Council imposed the commonality requirement by way of the amalgamation condition. But the Council always had the power to agree to de-amalgamation, which would open the way to a break in the commonality of ownership. We see this as supporting the view that the deed did not require such commonality.

[53] Second, although the owners of Lots 2 and 3 each owned a one half share of Lot 4, their rights in terms of use (and therefore access) differed so as to meet the Council's requirements, and their obligations to meet costs differed correspondingly. This indicates that the appellants' argument that the deed was simply a management arrangement between the owners of Lot 4 in which the Council had no interest does not fully capture the deed's significance. The Council was concerned to ensure that the appropriate number of parking spaces were provided for Lot 2 and for Lot 3 and, to achieve this, the parties had to establish use rights in the deed which did not simply reflect their rights as owners of Lot 4.

[54] No one has contended that the de-amalgamation of Lot 2 from its half interest in Lot 4 brought the deed of covenant to an end. Rather, it was accepted that it remained in effect, as is indicated both by the appellants' claims against the Body Corporate for reimbursement of its share of the expenses incurred on the parking building post de-amalgamation and by the appellants' recognition that a court order was required to bring the deed to an end. Given the statutory framework, the deed is enforceable by the owners of Lot 2 at least to the extent that they could obtain an injunction to prevent the appellants from allowing others to use the parking spaces that remain allocated to Lot 2 in the building.

[55] But according to the appellants, what the deed does not do is to give the owners of Lot 2 a positive right to use the parking spaces or to utilise the driveway on Lot 4 to enter and leave the facility. Their rights of access and use arose from the fact that, in common with the owners of Lot 3, they owned Lot 4. Once the ownership link between Lot 2 and Lot 4 was broken, the owners of Lot 2 lost their rights of access and use of Lot 4 despite the deed of covenant. It was emphasised that the relevant covenants were negative in form, not positive. Further, rights of access (and possibly also use for parking) could only be conferred by way of easement.

[56] We do not agree that this is the outcome. Under the deed, the owners of Lot 4 undertook obligations to keep the parking building in a proper state of repair and, if the building was damaged or destroyed, to repair or reconstruct it. If they met their obligations, the owners of Lot 4 were entitled to recover the costs incurred from

the owners of Lots 2 and 3 in the proportions provided for in the deed, as the appellants did in the present case. If the owners of Lot 4 did not meet their obligations, the owners of Lot 2 or of Lot 3 were entitled to carry out the necessary work on the building and recover the expenditure (plus interest) from the owners of Lot 4 (who would presumably recover the amount paid over proportionately from the owners of Lots 2 and 3). All parties to the deed, then, have positive obligations which involve spending money to keep the parking building:

(a) in existence;

(b) properly maintained; and

(c) operating.

Under the combination of the encumbrance and the deed, the allocated parking spaces are available only to the owners of Lots 2 and 3. The various responsibilities and powers that the owners of the three lots have under the deed are all premised on this requirement.

[57] While the owners of Lot 4 were not permitted to allow anyone other than the owners of Lots 2 and 3 to use the parking building, the use rights of the owners of Lots 2 and 3 were not co-extensive with ownership of Lot 4. Rather, they were regulated by the deed in accordance with the Council's requirements. So the owners of Lot 3 had no right to use the parking spaces in the basement allocated to Lot 2 without the consent of the owners of Lot 2. It does not appear to be disputed that if Escrow and Kallina were to allow access to, or use of, the parking building in a way that was inconsistent with the deed, they could be stopped, by way of injunction if necessary.

[58] The fact that the language of the deed does not require continued commonality of ownership between Lots 2 and 3 on the one hand and Lot 4 is telling. If the deed was intended to continue to operate in the absence of commonality of ownership, as we consider it was, that could only be on a meaningful basis. An interpretation of the deed which required the owner of Lot 2 or

of Lot 3 to continue, after de-amalgamation, to pay for the upkeep and operation of the parking building but without any entitlement to access or use the building could not possibly have been intended.[59] That would be an absurd outcome.

[59] In light of these features of the deed, we consider the appellants can be prevented, by injunction if necessary, from denying the owners of Lot 2 the use of, and therefore access to, their designated parking spaces in the basement of the parking building on Lot 4. We do not see this as creating some new species of right or enhanced interest in land, nor do we see it as contrary to the *numerus clausus* principle. We acknowledge that easements and covenants differ in legal form and that, in practice, they have been used in different ways.[60] But once it is accepted that Parliament has provided that covenants, whether positive or negative, can be notified on the title, run with the land and are enforceable in equity, we see no sensible reason why a party bound by a covenant cannot be prevented by injunction from acting inconsistently with the promise it contains even if the practical effect of that is that the party must allow another onto its land. In a case such as the present, any other outcome has little or nothing to commend it.

Decision

[60] For these reasons, the appeal is dismissed. The appellants must pay the second to twelfth respondents costs of $25,000 in total plus reasonable disbursements, to be fixed by the Registrar if necessary. We certify for two counsel.

Solicitors:
Goodwin Legal, Auckland for Appellants
Legal Vision, Auckland for Second to Twelfth Respondents

---

[59] Even more so if the owners of Lots 2 and 3 were entitled to prevent the owner(s) of Lot 4 from allowing anyone else to use their parking allocated parking spaces.

[60] See McMorland, above n 46, at [16.010].