IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 84/2016
[2018] NZSC 115

BETWEEN	GREEN GROWTH NO. 2 LIMITED Appellant
AND	QUEEN ELIZABETH THE SECOND NATIONAL TRUST Respondent

Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	N R Campbell QC and W A McCartney for Appellant R J B Fowler QC for Respondent
Judgment:	26 November 2018

JUDGMENT OF THE COURT

A The application for partial recall of this Court's judgment of 17 August 2018 (*Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75) is dismissed.

B There is no order for costs.

REASONS

Introduction

[1] This is an application by Green Growth No. 2 Limited (Green Growth) for the partial recall of a judgment issued by the Court on 17 August 2018.[1] The judgment concerned an appeal relating to an open space covenant. The covenant was granted in

[1] *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75 [*Green Growth* (SC)].

favour of the Queen Elizabeth the Second National Trust (the Trust) over land currently owned by Green Growth. The appeal concerned the validity of the covenant and, if valid, its application.

[2] The High Court[2] and Court of Appeal,[3] although for different reasons, had both found the covenant was valid and that it should be rectified to reflect the common intention of the Trust and the original owner of the land with whom the Trust entered into the covenant. The effect was that provisions of the covenant directed to an undefined protected area applied to all of Green Growth's land. In very general terms, the effect was to limit potential development of the land.

[3] On the appeal to this Court, the Court agreed with the Courts below that the covenant was valid. The Court did not agree that rectification was available against Green Growth as a successor in title. By a majority, the Court considered the same effect was reached on the proper interpretation of the covenant. The appeal was accordingly allowed only to the extent that the order for rectification was set aside. A declaration was made that for the purposes of the relevant clauses of the covenant, references to the protected area meant the whole block of land subject to the covenant.

[4] Green Growth seeks recall of the part of the judgment in which the Court made the declaration.

Background

[5] Some further background information is necessary to put the application in context.

[6] The key provisions of the covenant in issue are found in the second schedule. In this schedule "the land" is defined as "the property or part thereof defined as subject to this covenant". The expression "protected area" is separately defined as meaning

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2 *Queen Elizabeth the Second National Trust v Green Growth No 2 Ltd* [2014] NZHC 3275, (2014) 15 NZCPR 785 (Wylie J) [*Green Growth* (HC)].

3 *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2016] NZCA 308, [2016] 3 NZLR 726 (Randerson, Stevens and Wild JJ) [*Green Growth* (CA)].

"the area of native trees shown as area [blank] on illustrative aerial photo attached". No photograph was attached.

[7] The first paragraph of cl 2 of the second schedule provides that nothing can be done on the land:

> … which in the opinion of the Board materially alters the actual appearance or condition of the land or is prejudicial to the land as an area of open space as defined in the Act.

[8] The second paragraph of cl 2 begins in this way:

> In particular, on and in respect of the protected area, except with the prior written consent of the Board, or as outlined in the Third Schedule, the Owner shall not:

There then follows a list of particular activities that cannot be undertaken on the land including constructing new buildings.

[9] Clause 3 is also relevant and provides as follows:

> In considering any request by the Owner for an approval in terms of Clause 2 hereof, the Board will not unreasonably withhold its consent if it is satisfied that the proposed work is in accordance with the aim and purpose of the covenant as contained in the First Schedule.

[10] Under cl 7 of the second schedule the owner is required to keep the boundary fences of the protected area in good repair.

[11] Finally, the second schedule is subject to the rights of the owner provided for in the third schedule which relevantly include the ability to construct one dwelling and ancillary buildings after consultation with the Trust.

[12] As foreshadowed, the Court unanimously agreed that the covenant was valid and that rectification was not available.

[13] Elias CJ, with whose interpretation Glazebrook and Ellen France JJ agreed,

concluded that the scheme of the covenant is that all of the land is protected by cl 2 except to the extent the third schedule allowed development. The Chief Justice emphasised the sense of the second paragraph of cl 2, as indicated by its opening words, and the scheme of protection in the covenant overall, suggested the restricted activities for which the Trust's permission was required were illustrative of the general limits in the first paragraph of cl 2. On this approach, the definition of "protected area" in cl 1 was not necessary as all of the land not within the development permitted by the third schedule was subject to the protections of cl 2.[4]

[14] Glazebrook J, delivering a separate judgment, emphasised the need to interpret the covenant in light of the purpose of the Queen Elizabeth the Second National Trust Act 1977.[5] Glazebrook J also noted the list of restricted activities in the second paragraph of cl 2 may be helpful aids to the Trust's decision-making under the first paragraph of cl 2.[6] Glazebrook J relied further on the inter-relationship between cl 2 and the third schedule.

[15] Ellen France J agreed with the reasons given by the Chief Justice.[7]

[16] William Young and O'Regan JJ (in a judgment delivered by William Young J) took a different view. They concluded that the restricted activities in the second paragraph of cl 2 applied only to a protected area which is a smaller undefined area than the whole property less the area referred to in the third schedule. William Young J also noted that although the issues arising on this aspect of the case were difficult, "their practical significance in terms of result is limited".[8] That was because, "on any conceivable result, Green Growth's ability to develop the land" was "constrained by the opening words of cl 2 and … therefore practically confined" to the provision in the third schedule.[9]

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4 *Green Growth* (SC), above n 1, at [134]–[137].
5 At [154].
6 At [157].
7 At [161].
8 At [50].
9 At [50].

The application for partial recall

[17] Green Growth seeks recall of that part of the judgment in which the Court made the declaration as to the meaning of the covenant. Green Growth says the question of the meaning of the covenant was not in issue either by reason of the terms of the grant of leave[10] or as a matter arising out of the argument for the Trust.

[18] In particular, it is submitted that the Trust did not suggest that the particular restrictions in cl 2 (the listed activities) were applicable to the whole of the land. Green Growth also says the Court did not indicate a declaration might be made in those terms. The end result, Green Growth submits, is that Green Growth did not have the opportunity to be heard on the possibility such a declaration may be made.

[19] The Trust opposes recall. The Trust does so on the basis the application has no prospect of success. The Trust also says that Green Growth had the opportunity to address the issue and preferred instead to argue that the covenant was not valid.

Our assessment

[20] It is the case that the Trust did not contend for the interpretation which prevailed. Further, the possibility of a declaration in that form was not signalled directly and, as the differing views indicate, there is scope for argument as to the correct approach. That said, in assessing whether the grounds relied on comprise a "very special reason" justifying recall, the following points indicate that test for recall is not met.[11]

[21] The first point to note is that in the High Court the Trust sought a declaration as to the interpretation of the covenant. That was part of the relief pleaded and was squarely on the table at that point.[12]

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10 *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2017] NZSC 127.

11 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2], citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633 per Wild CJ.

12 Wylie J did not consider the restrictions in the second paragraph of cl 2 applied to the whole block of land: *Green Growth* (HC), above n 2, at [91]–[92]; and see the discussion in the reasons of William Young J, *Green Growth* (SC), above n 1, at [52]–[53].

[22] Second, we observe that the Court of Appeal gave indications of its view of the interpretation of the covenant albeit in the context of considering whether rectification would be adverse.[13] The Court noted the approach taken to rectification by Wylie J in the High Court meant the list of restrictions in the second paragraph of cl 2 applied to all of the land. The Court did not consider this materially increased the burden of the covenant on Green Growth.[14]

[23] The third point that can be made is that there were numerous references, as Mr Campbell QC for Green Growth properly acknowledges, in the course of the hearing to the prospect an interpretation issue might arise. There was also at least an indication, albeit we accept not put centre stage, that interpretation was an option if rectification was not available. This aspect was not pursued by Green Growth although no doubt that is a reflection of the points made at the outset of this discussion.

[24] Finally, the issue that Green Growth would like to pursue is of no practical moment. The outcome the Court reached is no different from that reached in the Courts below albeit, we accept, by a different route. Nor does Green Growth's proposed approach alter the practical outcome.

[25] In relation to the latter point, Green Growth provided an outline of the submissions counsel would make if leave were granted and we have considered those. They advocate for an approach largely reflecting that which William Young and O'Regan JJ took to interpretation. Even on the approach contended for, the first paragraph of cl 2 would be effective in restricting activities on the land "which in the opinion of the Board" are "prejudicial to the land as an area of open space". Further, the rights of the owner would be as provided for in the third schedule which anticipates the construction of one dwelling.

[26] When all of these matters are considered in the round, we conclude the ground for partial recall is not made out. The application is dismissed.

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13 The Court of Appeal concluded that where rectification was sought against a successor in title, the court may address whether the claim was adverse to the proprietor's interests and whether the grant of an order for rectification would undercut indefeasibility. If the order would not have that effect, relief by way of rectification was available: *Green Growth* (CA), above n 3, at [91].

14 At [94].

[27] Given the context in which the application was made, we are satisfied costs should lie where they fall in relation to the recall application.[15] There is no order for costs.

Solicitors:
Carson Fox Bradley Limited, Auckland for Appellant
Gibson Sheat, Wellington for Respondent

[15] See above at [20].