Supreme Court of New Zealand
Te Kōti Mana Nui

17 AUGUST 2018

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GREEN GROWTH NO. 2 LTD v QUEEN ELIZABETH THE SECOND NATIONAL TRUST

(SC 84/2016) [2018] NZSC 75

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

This case concerns a dispute between a land owner, Green Growth, (the appellant) and the Queen Elizabeth the Second National Trust (the Trust) about the validity of a covenant over a 404 hectare block of land near Tairua. The open space covenant was granted in favour of the Trust by its then owner, the late Mr Humphrey Mallyon Russell, under provisions of the Queen Elizabeth the Second National Trust Act 1977 (The QEII Act). The land was sold in 1999 some two years after the covenant was notified, and four years before Mr Russell died. The current owner, Green Growth, acquired the property in 2012.

There were irregularities in the execution and certification of the covenant, but, these were not apparent, when it was notified on the title on 24 July 1997. As notified the covenant is incomplete as it refers to a protected area defined by reference to an aerial photograph which is not attached. There are particular provisions in the covenant which are expressed as applying to the protected area but, there being no supporting photograph, the land to which these provisions apply is not defined.

In proceedings between the Trust and Green Growth, the Trust sought to resolve the difficulties associated with the non-definition of the protected area, and sought relief which included rectification of the covenant removing references to the protected area. Green Growth resisted the

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Trust's claim. It counterclaimed against the Trust on the basis that the open space covenant was invalid and should be removed from the register. Its claim relied in part on s 81 of the Land Transfer Act 1952 (LTA), which allows correction of the register where an entry has been "wrongfully obtained".

Both the High Court and Court of Appeal concluded that the covenant is valid, albeit for different reasons, and that it should be rectified to reflect what those Courts held to have been the common intention of the Trust and Mr Russell; in effect that the provisions of the covenant directed to the undefined protected area should apply to the entire block, except for land covered by the third schedule (essentially a house site).

The Supreme Court has allowed Green Growth's appeal from the Court of Appeal decision but only to the extent that the order for rectification is set aside. In its place, there is a declaration as to the interpretation of the covenant which is to the same practical effect as that arrived at by the Courts below.

In their reasons, William Young and O'Regan JJ (with the rest of the members of the Court agreeing on this point) found that the notification process under the QEII Act and LTA resulted in the Trust becoming the registered proprietor of an interest in land created by covenant as notified which is indefeasible under s 62 of the LTA (which protects registered proprietors from adverse claims) with the result that the covenant as notified is effective, irrespective of informalities in its execution and certification.

Green Growth's case was conducted on the basis s 81 of the LTA could be invoked only if the Trust did not have a registered and indefeasible title to the interest created by the covenant. Having concluded that the Trust had a registered and indefeasible title, William Young, O'Regan and Glazebrook JJ therefore resolved this aspect of the case in favour of the Trust. Elias CJ (with Ellen France J agreeing on this point) did not think it was necessary or appropriate to resolve whether recourse to s 81 could defeat an indefeasible interest but found that s 81 was not available as the Trust had not wrongfully procured notification of the covenant.

All members of the Court considered that the problem of the undefined protected area could be resolved on proper interpretation of the terms of the covenant. They also all agreed that the Registrar could under s 80 of the LTA, delete any provisions which, on the interpretation arrived at, were ineffective. There was, however, divergence on how the covenant should be interpreted. In her reasons, Elias CJ (with Glazebrook and Ellen France JJ concurring on this point) considered that references to "protected area" mean the whole block of land subject to the covenant. Conversely, in their reasons, William Young and O'Regan JJ considered that the "protected area" was intended to be a smaller area than the whole block and, as it was undefined, the provisions relating to it were ineffective.

Finally, all members of the Court held that rectifying the covenant against Green Growth based solely on its notice of the defects in the covenant would be inconsistent with the indefeasibility provisions in the LTA.

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