IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 50/2019
[2020] NZSC 157

BETWEEN	SYNLAIT MILK LIMITED Appellant
AND	NEW ZEALAND INDUSTRIAL PARK LIMITED First Respondent
	YE QING Second Respondent

Hearing:	3 and 4 June 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	J G Miles QC, A J Horne and J T Hambleton for Appellant A R Galbraith QC and D T Broadmore for Respondents
Judgment:	22 December 2020

JUDGMENT OF THE COURT

A The appeal is allowed.

B There is no order as to costs.

REASONS
(Given by O'Regan J)

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Introduction

[1] This case concerns the power in s 317 of the Property Law Act 2007 for a court to extinguish or modify an easement or covenant registered on the title for one or more parcels of land. The contrasting outcomes in the High Court and Court of Appeal in this case illustrate the varying approaches that have been taken to the power conferred on the court by s 317. In the High Court, the application made by the predecessor in title of the land now owned by the appellant, Synlait Milk Ltd (Synlait), to extinguish or modify the two covenants at issue in this case was granted.[1] The Court refused to order the payment of compensation to the first respondent, New Zealand Industrial Park Ltd (NZIPL), but awarded NZIPL costs on an indemnity basis.[2] The Court of Appeal allowed an appeal by the respondents and reinstated the covenants.[3]

[2] The covenants restrict the use of the land that is subject to the covenants (the burdened land) to farming and forestry operations. Synlait has built a dairy factory (an infant formula manufacturing plant which we call "the Synlait plant"), part of which is on the burdened land. The location of part of the Synlait plant on the burdened land is a breach of the covenants. This was important background to the application.

Synlait's status as appellant and leave to appeal

[3] Synlait was not a party to the proceedings in the High Court and Court of Appeal, which were conducted by Stonehill Trustee Ltd (Stonehill), the then owner of the land now owned by Synlait (we will call this "the Synlait land"). However, having purchased that land, Synlait was substituted as applicant for leave to appeal to this Court. At the same time, leave to appeal was granted.[4]

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1 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 2938 (Woolford J) [HC judgment] at [54].

2 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 3436 (Woolford J) [HC compensation judgment] at [8] and [14]. See also *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2019] NZHC 2406 (Woolford J) [HC costs judgment].

3 *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd* [2019] NZCA 147, (2019) 20 NZCPR 119 (Gilbert, Wylie and Thomas JJ) [CA judgment] at [131]–[132].

4 *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2019] NZSC 117 [SC leave judgment].

Settlement

[4] After the hearing of the appeal, counsel filed a joint memorandum advising the Court that the parties had reached a conditional settlement that would resolve the dispute that gave rise to the present appeal. They indicated that it was expected that, once the settlement became unconditional, the appeal would be abandoned. They requested that the Court not issue its judgment pending the outcome of the settlement discussions.

[5] The judgment was in the final checking process when this memorandum was received. The Court did not issue the judgment in light of counsel's request. But we issued a minute indicating to counsel that we were considering issuing the judgment even if the settlement became unconditional and the appeal was abandoned. We sought their views on that possibility.

[6] Counsel filed a joint memorandum in which they indicated that the terms of the settlement required the parties to request that the Court not issue its judgment, and they made such a request in accordance with that agreement. As is apparent, we have decided to deliver the judgment. Our reasons for doing so are set out below. Counsel requested that, if the Court nonetheless decided to issue the judgment, this not be done until the settlement was concluded. We have deferred the delivery of the judgment accordingly.[5] They also asked that it be made clear in the judgment that a settlement was reached and the judgment does not therefore determine the respective rights and interests of the parties in relation to the matters at issue in the appeal. We confirm that is the case.

[7] In its decision in *Osborne v Auckland Council*, this Court observed that, where a settlement occurs after the hearing of an appeal, the Court has a discretion whether to deliver judgment.[6] It decided in that case to do so, given the issues involved were matters of public importance that were likely to affect people other than the parties and the questions had been fully argued. The Court noted that the outcome would have been reasonably apparent from the way the argument went.[7]

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5 Counsel have now confirmed that the settlement has been concluded.
6 *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [42].
7 At [43].

[8] The principles outlined in Osborne were applied in *Zurich Australian Insurance Ltd v Cognition Education Ltd*[8] and *PricewaterhouseCoopers v Walker*.[9]

[9] In this case, our reasons for delivering the judgment despite the settlement are:

(a) the issues raised by the appeal are matters of general importance;

(b) the Court has heard full argument on those issues; and

(c) this Court's views differ markedly in some respects from those of the Court of Appeal in the decision under appeal.

[10] The remainder of this judgment sets out what we would have done if no settlement had been reached.

Burdened land and benefited land

[11] The covenants at issue in this appeal relate to land at Pōkeno, on the outskirts of Auckland.

[12] When the covenants were entered into, the benefited land[10] was one large block over 140 ha in area.[11] Within this block was an area containing a basalt resource, which made the benefited land a potential site for a commercial quarry. As outlined below, the benefited land has been subdivided and now has four separate owners. The area containing the basalt resource is owned by NZIPL (we will call the land now owned by NZIPL "the NZIPL land").

[13] The burdened land, at the times the covenants were entered into, was a block of 9.74 ha. As a result of various transactions described later, the burdened land is now split across three titles. Part of the burdened land has been amalgamated with the

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8 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [2].

9 *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [4] per Glazebrook, Arnold, O'Regan and Ellen France JJ. Contrast the approach of Elias CJ at [108]–[113].

10 We use the terms "benefited" and "burdened" land (the terms used in the Property Law Act 2007), rather than "dominant" and "servient" land as the Court of Appeal did.

11 The 1998 covenant benefited 15 parcels totalling 141.87 ha and the 2000 covenant benefited 14 parcels totalling 155.94 ha. Nothing turns on this difference between the covenants.

part of the benefited land (the Synlait benefited land) to form the Synlait land. Another part has been amalgamated with part of the benefited land to form a block of land owned by Stuart PC Ltd (Stuart PC) (we will call the land now owned by Stuart PC "the Stuart PC land"). A small part of the burdened land is now part of the NZIPL land (the NZIPL burdened land).

[14] A map provided by the respondents depicting the relevant areas of land is reproduced in the appendix to this judgment.[12]

Covenants

[15] There are two covenants, one entered into in 1998 and one entered into in 2000. They are virtually identical in form.[13]

[16] The covenant entered into in 2000 recites that the owner of the benefited land proposes to carry out quarrying activities "which result in or are likely to result in noise, vibration, earth movement, dust, effects of explosion and the usual incidences of Quarrying which may have consequences beyond the boundaries of the [benefited land]". This makes it clear that the purpose of the covenant is to protect the ability of the owner of the benefited land to carry on quarrying activities on the benefited land.

[17] The covenant then provides, in relevant part, as follows:

> The Covenantor for itself and its successors in title to, and assigns and lessees of, the [burdened land] or any part of it, hereby covenants and agrees with the Covenantee, its successors in title and assigns and the occupiers and the operators of the [benefited land] or any part of it, from time to time, as a positive covenant for the benefit of the registered proprietors and users from time to time of the [benefited land], that the Covenantor will henceforth and at all times hereafter observe and perform all the stipulations and restrictions contained in Schedule 3 to the end and intent that such stipulations and restrictions shall forever enure for the benefit of, and be appurtenant to, the [benefited land] and the occupiers and operators of the [benefited land] for a term of 200 years from the date of this deed, or terminating on such earlier date as quarry operations on the [benefited land] shall cease provided always that any party shall as regards this covenant be liable only in respect of breaches of this covenant which shall occur while it shall be the registered proprietor of the [burdened land] or any part thereof.

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12 The Synlait land is referred to in the map as the "Pokeno Land".

13 The covenants are land covenants D284105.4 and D541257.6.

SCHEDULE 3
Covenants

1. The Covenantor shall ensure that at all times during the term of this covenant, the [burdened land] is used only for the purpose of planting and maintaining forestry and/or for grazing or lifestyle farming, which use may include the erection of implement sheds and/or storage sheds, provided that any lifestyle farming will not interfere with the operation of the quarry on the [benefited land]. In particular but without limiting the generality of the foregoing, the Covenantor shall ensure that no additional dwelling is erected or placed on the [burdened land].

2. The Covenantor is aware of, and will take all reasonable and appropriate steps to advise all purchasers, lessees, licensees or tenants or any other users coming to use or having an interest in the [burdened land] or any part thereof, of:

   a) the proximity of a working quarry and other land to be developed and used as a working quarry located upon the [benefited land]; and

   b) the usual incidences of quarrying including (but without limitation) noise, vibrations, earth movements, transport of materials, dust, and effective explosion ("Quarrying") which may have consequences beyond the boundaries of the [benefited land].

3. The Covenantor will allow the Covenantee to carry on the activities of Quarrying without interference or restraint from the Covenantor.

4. The Covenantor shall not make or bring any claim, will, demand for damages, costs, expense or allege any liability whatever on the part of the Covenantee and/or the quarry occupiers or operators arising out of or caused or contributed to by the fact that the [benefited land] is used by the Covenantee, and/or its occupiers or operators for Quarrying provided that Quarrying is being carried out in compliance with clause 3 of this deed.

5. The Covenantee and/or the occupiers and operators of the [benefited land] covenant with the Covenantor, that for the remaining economic life of the quarry, that Quarrying on the [benefited land] will, subject to the proviso at the end of this clause, at all times be carried on in full compliance with the applicable rules of the Franklin District Council District Plan. Provided that such compliance is without prejudice to any existing use rights enjoyed by the Covenantee and/or occupiers and operators of the quarry which may be inconsistent with District Plan requirements.

6. The Covenantor shall not, as part of any application for a resource consent by the Covenantee and/or the occupiers and operators of the [benefited land] related to the Quarrying use, or as part of any review of or change to the applicable District Plan, whether on the grounds of the effects of Quarrying on the use of the [burdened land] or on any other ground, make any submission seeking to apply to the [benefited

> land] any noise, dust and/or vibration standards or any other environmental controls, rules or policies, which are more stringent on the [benefited land] than those which apply currently or in the future, under the District Plan applicable to the [benefited land] or to the surrounding similarly zoned land.
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> 7. The Covenantor shall pay its solicitor's legal costs and disbursements directly or indirectly attributable to the perusal, execution and registration of this deed and its covenants together with the Covenantee and/or the quarry occupiers' and operators' solicitor's legal costs and disbursements directly or indirectly attributable to the enforcement of this deed and its covenants.
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> 8. The Covenantee and/or quarry occupiers and operators shall pay its solicitor's legal costs and disbursements directly or indirectly attributable to the preparation, perusal and execution of this deed and its covenants.

[18] The only material difference between the two covenants in the present context (other than the slightly different areas of benefited land referred to earlier) is that cl 1 of sch 3 to the 1998 covenant did not include planting and maintaining forestry as a permitted use of the burdened land.

[19] An area of land adjacent to the NZIPL land (identified on the map in the appendix as the Rainbow Water land) is also subject to a covenant in similar form to the covenants in issue in this case. That covenant was entered into in 1998.

Modify or extinguish?

[20] In its application to the High Court, Stonehill sought the modification of the covenants "so that they no longer apply to [the area of the Synlait land that is burdened land under the covenants (the Synlait burdened land)]". Stonehill, in effect, sought extinguishment of the covenants so far as the Synlait burdened land was concerned. In the alternative, it sought the modification of the covenants by the deletion of cl 1 of sch 3 "to enable development to be carried out on [the Synlait burdened land]".

[21] The High Court Judge ordered that the covenants be modified so they no longer applied to the Synlait burdened land, observing: "In effect, they are extinguished in respect of the [Synlait burdened land]".[14]

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[14] HC judgment, above n 1, at [54].

[22] The Court of Appeal found that none of the grounds in s 317(1) of the Property Law Act was made out, but did not consider the difference between effective extinguishment of the covenants in relation to the Synlait burdened land and their modification by deleting cl 1 of sch 3 to enable development on the Synlait burdened land.[15] Synlait says this was an error.

[23] A few days after the Court of Appeal judgment was delivered, Synlait wrote to NZIPL seeking resolution of the issues relating to the covenants "in a mutually beneficial way". A copy of this letter was annexed to the affidavit of Leon Clement, Synlait's Chief Executive, filed with Synlait's application for leave to appeal to this Court. In that letter, Synlait said it had not, and would not, oppose NZIPL using the NZIPL land for a quarry. It then gave the following undertakings (the Synlait undertakings):

> So as to assure you and NZIPL that Synlait's plant will not prejudice NZIPL, Synlait now gives NZIPL the following undertakings and assurances:
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> (1) Synlait undertakes that it will comply with paragraphs 3 and 4 of schedule 3 of the covenants, which, in summary, oblige it to allow NZIPL to carry on quarrying on its land and not to make any claim arising out of such quarrying.
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> (2) Synlait undertakes that it will not object to or oppose any application by NZIPL for resource consent and any other necessary approvals to quarry its land to which the covenants attach.
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> (3) Synlait undertakes that, upon NZIPL's request, it will take reasonable steps to support any application by NZIPL for resource consent and any other necessary consents or approvals to quarry its land to which the covenants attach.
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> (4) Synlait undertakes that it will not request that Waikato District Council applies any noise, dust, vibration or other environmental controls in respect of the NZIPL land that is subject to the covenants that are additional to or more stringent than those that apply under the district plan.
>
> Synlait is willing to discuss any other undertakings or assurances that NZIPL considers may be appropriate to provide it with an assurance that it will not be prejudiced by the removal of the covenants.
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> These undertakings and this letter are given to NZIPL on an open basis, so that they may be relied upon.

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[15] CA judgment, above n 3, at [120].

[24] In this Court, Synlait sought, as its primary position, the effective extinguishment of the covenants in respect of the Synlait land. But, at the hearing of the appeal, its counsel, Mr Miles QC, indicated that Synlait accepted the simplest solution would be the modification of the covenants by deleting cl 1 of sch 3. He described this as the "best result" for Synlait and did not pursue further the effective extinguishment of the covenants in relation to the Synlait burdened land. He noted that the Synlait undertakings were more extensive than the remaining clauses in sch 3. They do not, however, run with the land (and bind a subsequent purchaser) as the covenants do.

[25] Mr Miles submitted that the Court could, if it thought it appropriate, "modify the covenants to reflect the undertakings that Synlait has given to NZIPL".[16] He submitted the Court could allow the appeal and then leave it to the parties to resolve the actual terms of the modified covenants, allowing for "tweaking" of the terms of the Synlait undertakings. In particular, he said Synlait would agree to provide written approval to any resource consent application by NZIPL or any successor in title and to do so in a manner that bound future owners of the Synlait burdened land.

[26] We do not think it would be appropriate to take up Mr Miles' suggestion. A modification along the lines suggested is outside the scope of the pleaded case. The proposal to make amendments to the covenants of the kind suggested has not been considered by either the High Court or the Court of Appeal. We propose, therefore, to deal with the case on the basis that the modification under consideration is the deletion of cl 1 of sch 3 to both covenants. The existence of the Synlait undertakings is part of the factual background, but the terms of the undertakings are not part of the modification under consideration.

[27] The present proceedings deal with the covenants only insofar as they affect the Synlait burdened land. The proceedings do not affect the covenants insofar as they affect the NZIPL burdened land or the part of the Stuart PC land burdened by the covenants.

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[16] The Synlait undertakings appear to have been drafted on the assumption that the covenants would be effectively extinguished insofar as they apply to the Synlait burdened land. In the event that the covenants were modified to remove cl 1 of sch 3, but otherwise remained as they are, the undertakings would duplicate some of the remaining provisions of the covenants.

Fresh evidence

[28] Synlait filed an application to adduce further evidence alongside its application for leave to appeal. It seeks to adduce an affidavit from Mr Clement as well as an affidavit from its planning expert, Philip Comer. Annexed to Mr Clement's affidavit is a copy of the letter setting out the Synlait undertakings referred to above. Mr Clement's affidavit also outlines Synlait's purchase of the Synlait land, the status of the construction of the Synlait plant, Synlait's reasons for proceeding in breach of covenant, and its plans to develop the remainder of the Synlait land. Mr Comer's affidavit deals with the effect of the Synlait undertakings on a future application for resource consents for a quarry on the NZIPL land.

[29] The application was opposed by the respondents, who signalled that if the application was granted, they would seek to adduce evidence in reply and to cross-examine Mr Clement.

[30] In its leave judgment, this Court said:[17]

> [1] The Court does not consider it appropriate to determine the application by Synlait Milk Ltd to adduce further evidence at this stage. However, the Court recognises that the respondents seek to adduce evidence in response to Synlait's proposed new evidence. The respondents may file an application to adduce one or more affidavits in response to Synlait's proposed evidence and the affidavits themselves. The Court will hear argument on both applications at the hearing and determine them at or after the hearing.

[31] The respondents subsequently filed affidavits from Cindy Guo, Richard Matthews, Ye Qing and Gareth Harris. Mr Ye is the second respondent and the sole shareholder and director of NZIPL. Mr Harris is a director of Havelock Bluff Ltd, which sold the land to Mr Ye and NZIPL. Mr Harris also leased what is now the Synlait land, which was used for grazing until February 2018. Ms Guo is a real estate agent who provided Mr Ye with information about land in the Pōkeno area.

[32] In Mr Ye's proposed affidavit, he emphasises the importance of the covenants (as well as three other covenants benefitting the land) in his decision to purchase the NZIPL land and takes issue with some of Mr Clement's evidence. He says that an

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17 SC leave judgment, above n 4.

application for consent for a quarry has not been substantially advanced because the application to rezone the land residential has not yet been determined. If the land is not rezoned, there would be scope for a much larger and long-term quarry. Based on his experience in the dairy industry, he says he is concerned about developing a quarry next to an infant formula plant and the potential for reputational harm to the New Zealand dairy industry.

[33] Mr Matthews' affidavit is largely a response to Mr Comer's. He says that the Synlait undertakings do not amount to "written approval" of a future application for resource consent for a quarry in terms of s 104(3)(a)(ii) of the Resource Management Act 1991. If Synlait did provide written approval, the Council would be unable to consider the effect of a quarry on Synlait. But even if written approval was given, he considered that this was still inadequate from NZIPL's perspective. For example, the Council would still be required to consider the cumulative environmental effects to which the Synlait plant contributes.

[34] We accept that the evidence of Mr Clement about the Synlait undertakings is fresh and cogent. Synlait was not a party to the proceeding in the High Court and Court of Appeal. We therefore admit this part of his evidence. We do not, however, admit the rest of his evidence, which is not relevant to the determination of whether the covenants should be modified. We also admit the evidence of the planning experts, Mr Comer and Mr Matthews, in relation to the issue of written approval, albeit that some of the material in their affidavits is closer to legal submissions than expert evidence. We think it is right to admit this evidence if the evidence about the Synlait undertakings is admitted, to assist the Court in evaluating the effect of the undertakings. We do not, however, admit the remainder of their evidence, which addresses Synlait's ability to obtain resource consent for the activities permitted under the covenants.

[35] We do not accept that the evidence of Mr Harris or Ms Guo is fresh or cogent and do not admit it. Nor is the evidence of Mr Ye as to what was important to him in his decision to buy the NZIPL land. This is not fresh and is, to some extent, repetitive of evidence already given. The same is true of his evidence that a quarry would be incompatible with an infant formula factory.

Facts

[36] Both Synlait and NZIPL purchased their parcels of land relatively recently. Because there have been a number of changes since the covenants were created, we will outline the steps that have led to the current landholdings in chronological order.

[37] At the times the covenants were created, the burdened land comprised two parcels totalling 9.74 ha. The land was owned by a Mr and Mrs Cleaver. They agreed to enter into the 1998 covenant as part of a settlement of proceedings initiated by Winstone Aggregates Ltd, the then owner of the benefited land, for an enforcement order to stop them building a dwelling on their land. The 2000 covenant was entered into when Winstone Aggregates transferred some of its land to Mr and Mrs Cleaver.

[38] As noted earlier, the benefited land, then owned by Winstone Aggregates, comprised more than 140 ha in area when the covenants were created.[18] The benefited land has been zoned for aggregate extraction and processing, with quarrying as a "restricted discretionary" activity under the Waikato District Plan – Franklin Section (the District Plan) since at least 2000.

[39] The burdened land and most of the surrounding area was zoned for rural use. The land is near the village of Pōkeno, which at that time had a population of 200 to 300 people.

[40] Winstone Aggregates obtained a resource consent to conduct quarrying operations on the benefited land in April 2002 pursuant to a decision of the Environment Court.[19] However, it did not act on this consent and no quarry was ever established.[20] The resource consent lapsed in 2009 and there is no current resource consent permitting quarrying on the benefited land. Quarrying remains a restricted discretionary activity.

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18 Winstone Aggregates subsequently became part of Fletcher Concrete and Infrastructure Ltd, but we will refer to it throughout as "Winstone Aggregates".

19 *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A80/02, 17 April 2002.

20 If Winstone Aggregates commenced quarrying operations, then stopped, the covenants would have come to an end. The term was for 200 years, but provision was made for termination "on such earlier date as quarry operations on the [benefited land] shall cease": see the text of the covenants above at [17].

[41] There have been a number of changes affecting the burdened land. One parcel was sold to a Mr and Mrs Bowater in 2003. That parcel and the remaining parcel were purchased by Stuart PC in March 2006. On 21 May 2007, the two titles of burdened land were merged, and then subdivided into two new titles, one of 8.0122 ha and the other of 1.7284 ha.

[42] The 1.7284 ha lot of the burdened land and a surrounding block of approximately 22.61 ha of the benefited land is now part of the Stuart PC land.[21] In its capacity as a holder of part of the benefited land (the Stuart PC benefited land), Stuart PC has notified the Court that it consents to any modification or extinguishment of the covenants insofar as they apply to the Stuart PC benefited land.

[43] The 8.0122 ha title was further subdivided in 2013 along with two other blocks to create four new titles. The 8.0122 ha of burdened land was distributed across three of the four new titles.

[44] This further subdivision created the 28 ha lot, which is the Synlait land. This comprises 20.8 ha of benefited land and 7.2 ha of burdened land. A parcel of 0.8880 ha of burdened land was vested in the Waikato District Council to enable the extension of McDonald Road, which borders the Synlait land. There was a partial surrender of the covenants over that area to enable this to occur. The balance of the burdened land became part of one of the titles which forms part of the NZIPL land. This is what we have called the NZIPL burdened land.

[45] Synlait purchased the Synlait land in February 2018 from Stonehill, which had purchased it only a few months previously. A condition of the sale was that Stonehill would arrange for the removal of the covenants from the title to the Synlait land.

[46] Another block of the benefited land comprising 27.4090 ha (one of the four titles mentioned above at [43]) was sold by Winstone Aggregates and, after a number of on-sales, was owned at the time of the application to the High Court by Grander Investments Ltd.[22] On 17 July 2019, it was transferred to Hynds Foundation,

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[21] Winstone Aggregates sold this land to Stuart PC in 2007. It was zoned rural at that time.

[22] Winstone Aggregates sold this block to Clever Investments Ltd in August 2013. Clever Investments sold it to a trust, which sold it to Grander Investments Ltd in June 2016.

an associated entity of Stuart PC (we will call this "the Hynds land").[23] Hynds Foundation has also notified the Court that it consents to the extinguishment or modification of the covenants insofar as they apply to its land.[24]

[47] The remainder of the benefited land is the NZIPL land. The NZIPL land is about 88 ha in area, nearly all of which is benefited land. Winstone Aggregates sold this land to Havelock Bluff in September 2013.

[48] When Winstone Aggregates sold what is now the NZIPL land, it did so without the benefit of any covenants binding the owners of the remaining benefited land to protect any potential quarry operation on the NZIPL land. So, as far as we can discern, there are no restrictions on the use of the benefited land now owned by Synlait, Stuart PC and Hynds Foundation. And the owners of those parcels of land are not restrained from opposing the grant of a resource consent for a quarry or complaining about the effects of any quarry operation that may be commenced on the NZIPL land.

[49] At the time Synlait agreed to purchase the Synlait land from Stonehill, the NZIPL land was still owned by Havelock Bluff. Stonehill asked Havelock Bluff to agree to the extinguishment of the covenants, but it declined. Havelock Bluff entered into the contract to sell the land to Mr Ye in May 2018, with settlement in October 2018. Mr Ye nominated NZIPL as purchaser.

[50] The current situation is, therefore, that the burdened land is part of both the Synlait land and the Stuart PC land (with a tiny portion being part of the NZIPL land). The Synlait burdened land and Stuart PC land is not contiguous with the NZIPL land. The remainder of both the Synlait land and the Stuart PC land is benefited land. The benefited land is now in four blocks owned respectively by Synlait, Stuart PC, Hynds Foundation and NZIPL. The NZIPL land is about 60 per cent of the benefited land. The only holder of benefited land opposing the extinguishment or modification of the covenants is NZIPL.

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[23] The Hynds land is referred to on the map in the appendix as the "Grander Land".

[24] The Stuart PC land has a plant owned by Hynds Pipe Systems Ltd located on it. Hynds Pipe Systems is another associated entity of Hynds Foundation and Stuart PC.

[51] After Synlait entered into the conditional agreement with Stonehill to purchase the land, it applied for resource consents to allow it to build the Synlait plant. It obtained the necessary consents on a non-notified basis in March 2018 and May 2018 and, despite not having taken title to the Synlait land, began excavation and other preparatory work for the construction of the Synlait plant. The site of the Synlait plant is partly on the Synlait burdened land and partly on the Synlait benefited land, but the great proportion of it is on the burdened land. Much of the Synlait benefited land is closer to the NZIPL land than the Synlait burdened land.

[52] In June 2018, the respondents' solicitors wrote to Stonehill's solicitors pointing out that the work being undertaken on the Synlait burdened land was in breach of the covenants and demanding that the work cease. They received no response.

[53] After the High Court decision, Synlait settled the purchase and pushed ahead with the construction of the plant. The respondents' lawyers notified Synlait that the High Court decision would be appealed. Synlait continued with construction of the Synlait plant despite the risk of the High Court decision being reversed on appeal. Synlait's investment in the plant is in the region of $250 million.

Planning changes

[54] There have been a number of planning changes since the covenants were entered into, reflecting the proximity of Pōkeno to the Auckland urban area and the intensification of the use of the land in the area.

[55] In 2008, the Pōkeno Structure Plan was adopted by the Franklin District Council. This recorded that the Council envisaged the expansion of Pōkeno from a village of around 500 people to an "urban village" with a population of around 5,000 people and approximately 80 ha of industrial land.

[56] In September 2012, Plan Change 24 became operative. This gave effect to the Pōkeno Structure Plan. It rezoned an area of about 80 ha, including the Synlait land and the Stuart PC land, "Industrial 2". This meant that the permitted uses of the land under the covenants (grazing, lifestyle farming and, in respect of the 2000 covenant, forestry) were no longer consistent with the zoning of the burdened land (they are

non-complying activities). It also rezoned land in the vicinity of the NZIPL land and the Synlait land residential and commercial, to enable the proposed town at Pōkeno to be established. However, the NZIPL land remained zoned aggregate extraction and processing with quarrying as a restricted discretionary activity. Winstone Aggregates supported the change of zoning of the Synlait land and Stuart PC land.

[57] In May 2018 another plan change, Plan Change 21, was approved. It rezoned rural land to the north of the NZIPL land Residential 2. Between this rezoned land and the NZIPL land is land owned by Rainbow Water Ltd. This land is zoned rural and serves as a buffer between the residential and aggregate extraction zones. In addition, a "large lot overlay" was applied to the southern part (closest to the NZIPL land) of the land rezoned residential to facilitate an appropriate transition between the residential, rural and aggregate extraction zones. The large lot overlay reduces the number of residential lots on that part of the land by increasing the minimum lot size. Together, the buffer zone and large lot overlay mitigate any potential effects on the residential area of future quarrying on the NZIPL land.

[58] In July 2018, the Proposed Waikato District Plan 2018 (the PWDP) was notified. Under the PWDP, the NZIPL land is to be rezoned rural with "extractive industry" as a discretionary activity. However, the evidence was that the process that will be required before this is adopted will be protracted and that little weight should be given to the PWDP.

[59] Havelock Village Ltd, another company owned by Mr Ye, which owns land near the NZIPL land, made a submission to the Waikato District Council on the PWDP. Havelock Village sought a change to the zoning of the NZIPL land and the surrounding land owned by Havelock Village to residential. However, it submitted that extractive industry should remain a restricted discretionary activity for the NZIPL land. In the event that proposal was not accepted, Havelock Village submitted the NZIPL land should retain its current zoning of aggregate extraction and processing with quarrying being a restricted discretionary activity. This would allow for a small quarry to meet the needs of the residential and tourism developments by Havelock Village and associated companies near Pōkeno.

Commercial and residential development

[60] Pōkeno's population had increased to about 3,000 by October 2018. Because of the planning changes, the residential area is now much closer to the basalt resource land. Further residential development is planned.

[61] There has also been commercial development in the vicinity of the NZIPL land and Synlait land and further development is planned. For example (as is apparent from the map attached as the appendix):

(a) Yashili New Zealand Dairy Company Ltd (Yashili) has built a substantial infant formula manufacturing facility on land adjacent to the Synlait land;

(b) Yashili plans to build another dairy factory on land which adjoins the NZIPL land at one corner;

(c) Winston Nutritional Ltd is planning to construct a milk product plant on the land connected to Yashili's land;[25] and

(d) Hynds Pipe Systems Ltd has built a concrete pipe manufacturing plant on the Stuart PC benefited land.

[62] Industrial development is permitted on the remainder of the Synlait benefited land, including the area that adjoins the NZIPL land. Industrial development could, therefore, occur closer to the basalt resource than the site of the Synlait plant. That part of the land is steep, however. The Court of Appeal observed that it was a matter of speculation as to whether Synlait could have built the plant on this part of the land.[26]

Summary of changes

[63] At the time the covenants were entered into, Winstone Aggregates owned all the benefited land. It was making plans to establish a substantial quarry on that land.

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25 Winston Nutritional is unrelated to Winstone Aggregates.
26 CA judgment, above n 3, at [105].

All of the burdened land was owned by the Cleavers and was zoned rural. The surrounding area was farmland and the residential area and small village of Pōkeno was some distance away. The motivation for the first covenant was that the Cleavers wanted to build a residence on their land and Winstone Aggregates was concerned a residence close to the quarry area could affect the resource consent application it was about to make. Winstone Aggregates subsequently obtained resource consent for a quarry.

[64] Things have changed since then. Winstone Aggregates effectively abandoned its plan to establish a quarry in the area. It allowed its resource consent for quarrying to lapse. It also supported the rezoning of the land around the basalt resource land from rural to industrial. It has progressively sold the benefited land, as outlined above, and the burdened land has been amalgamated with areas of benefited land (the Synlait land, the Stuart PC land and the NZIPL land). The burdened land is no longer contiguous with the land on which the basalt resource is located, but areas of the Synlait benefited land are. As mentioned earlier, Winstone Aggregates did not make any attempt to protect the potential for quarrying when it subdivided areas of the benefited land close to the basalt resource by ensuring the NZIPL land had the benefit of covenants from the owners of the remaining benefited land, though it must have known the zoning would allow for the building of industrial plants, as has occurred. In short, Winstone Aggregates' plan was for a quarry surrounded by rural land. It appeared to recognise that a quarry would not be feasible once the surrounding area ceased to be rural land.

Relevant law

[65] The application to extinguish or modify the covenants was made in reliance on ss 316 and 317 of the Property Law Act. Section 317 was amended the day before the High Court decision was delivered.[27] The sections, including that amendment, now provide as follows:

> **316 Application for order under section 317**
>
> (1) A person bound by an easement, a positive covenant, or a restrictive covenant (including a covenant expressed or implied in an easement)

[27] Land Transfer Act 2017, s 245(2).

may make an application to a court for an order under section 317 modifying or extinguishing that easement or covenant.

(2) That application may be made in a proceeding brought by that person for the purpose, or in a proceeding brought by any person in relation to, or in relation to land burdened by, that easement or covenant.

(3) That application must be served on the territorial authority in accordance with the relevant rules of court, unless the court directs otherwise on an application for the purpose, and must be served on any other persons, and in any manner, the court directs on an application for the purpose.

317 Court may modify or extinguish easement or covenant

(1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the **easement or covenant**) if satisfied that—

(a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:

(i) the nature or extent of the use being made of the benefited land, the burdened land, or both:

(ii) the character of the neighbourhood:

(iii) any other circumstance the court considers relevant; or

(b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or

(c) every person entitled who is of full age and capacity—

(i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or

(ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or

(d) the proposed modification or extinguishment will not substantially injure any person entitled; or

(e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or

> (f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.
>
> (2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[66] The amendment made to s 317(1) was the addition of paras (e) and (f). They apply only to covenants, not easements.[28] There was some debate as to whether these amendments were drawn to the attention of the Court of Appeal. When the Court set out the text of s 317 in its judgment, it included the new para (e) but omitted the new para (f).[29] It did not consider the potential application of either (e) or (f), which appears to have been because no argument was addressed to it on those provisions. Mr Miles argued their addition to s 317 was a further broadening of the circumstances in which a court could extinguish or modify a covenant.

[67] The cases on s 317 generally adopt a two-stage approach. The court's first task is to determine whether one (or more) of the grounds in s 317(1) is made out. If one (or more) of the grounds in s 317(1) is made out, the second task is to determine whether the discretion to extinguish or modify the covenant should be exercised. We adopt that approach. We acknowledge, however, that if the court finds one or more of the grounds in s 317(1)(a) is engaged, it will have found that (using the words of s 317(1)(a)) "the easement or covenant ought to be modified or extinguished (wholly or in part)", which may bring into play at the first stage some of the considerations that are also relevant at the second stage.[30]

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[28] The new grounds were recommended by the Law Commission in connection with its recommendation that the law be changed to allow for the registration of covenants in gross. However, paras (e) and (f) apply to all covenants, not just covenants in gross: Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [7.55]–[7.57].

[29] CA judgment, above n 3, at [71].

[30] Similarly, if the court found s 317(1)(f) was engaged, it would have determined that it was just and equitable to modify or extinguish the covenant. That too may bring into play at the first stage some of the considerations that are also relevant at the second stage.

Court of Appeal's approach

[68] The Court of Appeal summarised the approach to s 317 as follows:

> [73] Section 317 of the Act also applies to easements, and in that context, this Court has observed that the courts have traditionally taken a conservative approach towards the exercise of the discretion it confers. The Court stated that there is good reason for this. Applications to modify or extinguish an easement (or covenant) generally impact adversely on existing property interests. While there has been a progressive broadening of the statutory power granted to the courts, and a commensurate relaxation of the approach the courts have adopted, s 317 of the Act still cannot be used to free a servient tenement owner from an easement (or covenant) simply to improve the enjoyment of his or her property for his or her private purposes. The courts are reluctant to allow contractual property rights to be swept aside in the absence of strong reasons.
>
> (footnotes omitted)

[69] The Court of Appeal cited with approval two High Court decisions which emphasised the need for strong reasons to justify the extinguishment or modification of a covenant under s 317.[31] These were:

(a) *Luxon v Hockey*, in which John Hansen J held that, in exercising its discretion, the court should take into account, among other things, the sanctity of contract and the expropriation of property rights;[32] and

(b) *Affco New Zealand Ltd v ANZCO Foods Waitara Ltd*, in which Ronald Young J referred to three "guiding principles" that have influenced the approach of the courts to s 317 and its predecessors:[33]

(i) the power should not be exercised to free the owner of the burdened land from a covenant merely because it makes it more enjoyable or convenient for his or her private purposes;

(ii) the length of time between the imposition of a covenant and the application for its modification is a relevant factor; and

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31 CA judgment, above n 3, at [74].

32 *Luxon v Hockey* (2003) 5 NZCPR 125 (HC) at [13].

33 *Affco New Zealand Ltd v ANZCO Foods Waitara Ltd* HC Wellington CIV-2004-485-499, 23 August 2004 at [136] and [139]. An appeal against this decision was allowed in part: *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA).

(iii) the court should not exercise its discretion to permit contractual obligations undertaken in the recent past from being swept aside unless it is shown there are very strong grounds for doing so.

[70] In both of these cases, the comments appear to have been directed to the second of the two stages mentioned above. But the conservative approach identified in both cases appear to affect also the way the courts approach the first stage.

[71] In the passage from the Court of Appeal judgment reproduced above, the Court acknowledged that there had been a "progressive broadening of the statutory power" and a "commensurate relaxation of the approach [of] the courts". Nevertheless, the Court relied on the approach that had been taken to the predecessor to s 317 before the broadening of the statutory power had occurred.

[72] Mr Miles criticised the Court of Appeal's approach, which he described as "unduly conservative". He said the approach was inconsistent with the legislative intent of s 317 in its current form and failed to acknowledge the parliamentary intention to broaden the scope of the power in s 317.

Legislative history

[73] Section 127 of the Property Law Act 1952, as originally enacted, was the earliest New Zealand provision empowering a court to modify or extinguish an easement or covenant. It gave the court a power to modify or extinguish an easement or covenant in relatively limited circumstances. In particular, when exercising the power in s 127, the court could not order the payment of compensation to the owner of the benefited land if an easement or covenant was modified or extinguished.

[74] The Property Law Amendment Act 1986 replaced s 127 with a new s 126G. In *Manuka Enterprises Ltd v Eden Studios Ltd*, Thorp J observed that s 126G(1) displayed "a legislative intention to broaden the basis upon which the Court's jurisdiction may be exercised".[34] He pointed to the fact that s 126G deleted the criterion in s 127 referring to the easement or covenant being "deemed obsolete" and

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[34] *Manuka Enterprises Ltd v Eden Studios Ltd* [1995] 3 NZLR 230 (HC) at 233.

to the fact that in other respects the language of the provision had been broadened. Thorp J noted that this meant that decisions under s 127 were of limited value in interpreting s 126G.[35] Nevertheless, Thorp J observed that under s 126G, the court should not permit a contractual obligation undertaken in the recent past to be swept aside unless it were shown there were strong grounds for doing so.[36]

[75] Section 126G was replaced by s 317.[37] The significant change in s 317 was the addition of a new subs (2), giving the court power to award compensation to any person affected by an order extinguishing or modifying an easement or covenant.[38]

The effect of the broadening of the power

[76] In *Harnden v Collins*, Randerson J reviewed the statutory history and observed: "The statutory history shows that there has been a progressive broadening of the scope of the section as well as a relaxation of the approach the courts have adopted to the discretion."[39]

[77] Randerson J noted that the power to award compensation was "clear statutory indication that Parliament intended the courts to have the ability in an appropriate case to grant an application to modify even if it has the effect of causing some degree of detriment to other parties".[40] He added that while a degree of caution was appropriate, the power to modify should not be so restrictively applied that the section ceased to have the remedial effect intended.[41] We agree.

[78] In *Okey v Kingsbeer*, the Court of Appeal described the nature of the discretion under s 317 as follows:[42]

> [52] The courts have traditionally taken a conservative approach towards the exercise of discretion under s 317 and its predecessors. This is for good

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35 At 233.
36 At 235.
37 As noted earlier, the original s 317(1) did not include (e) and (f).
38 The addition of the provision for the award of compensation was not recommended in the Law Commission's report that led to the Property Law Act 2007: Law Commission *A New Property Law Act* (NZLC R29, 1994). Rather, it was introduced at the Select Committee stage: Property Law Bill 2006 (89-2) (select committee report) at 5–6.
39 *Harnden v Collins* [2010] 2 NZLR 273 (HC) at [25].
40 At [43].
41 At [44].
42 *Okey v Kingsbeer* [2017] NZCA 625, (2017) 19 NZCPR 25 (footnotes omitted).

> reason: applications to modify or extinguish an easement generally impact adversely on existing property interests. However, there has been a progressive broadening of the statutory power granted to the courts, and a commensurate relaxation of the approach the courts have adopted. This is especially so given an award of compensation is now available under s 317(2). But s 317 still cannot be used to free a servient tenement owner from an easement simply to improve the enjoyment of his or her property for his or her private purposes. The courts should be hesitant to allow contractual property rights to be swept aside in the absence of strong reasons.

[79] Since the decisions in *Harnden v Collins* and *Okey v Kingsbeer*, s 317(1) has again been amended by the addition of paras (e) and (f), though these apply only to covenants, not to easements. We see that as further evidence of a parliamentary intention that the section should be applied less restrictively than it was in the past.

[80] Mr Miles argued that, in the present case, the Court of Appeal placed undue emphasis on "notions of the sanctity of historic contracts and resulting contractual property rights over the interests of the present-day landowners and the wider community". He argued that the approach adopted in recent High Court decisions reflected the true intent of s 317.

[81] Mr Miles relied in particular on the decision of Cooke J in *Pollard v Williams*.[43] In that case, Cooke J noted the amendments made over time to s 127, s 126G and s 317. He cast doubt on the dictum from *Okey v Kingsbeer* that s 317 cannot be used to free the owner of burdened land from an easement to improve his or her enjoyment of his or her property.[44] He then said:

> [18] Section 317 involves a balancing of policy considerations. It recognises the importance of property rights, and the sanctity of contract. But it also recognises other public policy considerations associated with the efficient utilisation of land resources. Parliament empowers the Court to act across contractual and property rights in light of the other policy considerations. Some restrictions can reasonably be removed, or relaxed. The balance struck by the section overall has changed in significant, but not necessarily profound, ways by the amendments made to the provision over time.

[82] Mr Miles urged us to adopt this approach to s 317.

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43 *Pollard v Williams* [2019] NZHC 2029, (2019) 20 NZCPR 371.
44 At [17].

[83] For NZIPL, Mr Galbraith QC supported the Court of Appeal's approach. He pointed out that the Court of Appeal did not need to address the discretion to extinguish or modify because it found that none of the grounds in s 317(1) was established.

[84] We consider caution is necessary in overlaying the clear statutory wording of s 317 with requirements that cases be exceptional, that sanctity of contract be protected, that property rights not be expropriated and the like. Easements and covenants are created subject to the provisions of the Property Law Act, including s 317. The extent of the sanctity of the contracts underlying easements and covenants and the nature of the property rights they create are governed by s 317 (and other provisions). There is a circularity about saying that property rights must be protected from the exercise of the power conferred by s 317 when the fundamental premise of the section is that those property rights are liable to be modified or extinguished.

[85] We would not, therefore, overlay the requirements of s 317 with additional, non-statutory criteria that have the effect of altering the clear parliamentary intention that easements and covenants should be amenable to modification or extinguishment in defined circumstances (noting that the defined circumstances are broader in the case of covenants because of the new paras (e) and (f) in s 317(1)).

[86] Nor do we consider it is correct to say that s 317 cannot be used to free the owner of burdened land from an easement (or covenant) simply to improve the enjoyment of his or her property for his or her private purposes, as the Court of Appeal said in *Okey v Kingsbeer*.[45] There is nothing in s 317 to that effect. As Cooke J noted in *Pollard v Williams*, "All applicants to vary an easement or covenant are no doubt seeking to improve the enjoyment of their own property."[46]

[87] We agree with the sentiment expressed in the context of equivalent Victorian legislation by Morris J in *Stanhill Pty Ltd v Jackson*.[47] He expressed the view that the generally conservative approach taken by the Australian courts to the equivalent provision in the relevant state legislation was the result of judges allowing themselves

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45 *Okey v Kingsbeer*, above n 42, at [52]. See above at [78].

46 *Pollard v Williams*, above n 43, at [19].

47 *Stanhill Pty Ltd v Jackson* [2005] VSC 169, (2005) 12 VR 224 at [25]–[26], [41] and [51]. The equivalent Victorian provision is s 84 of the Property Law Act 1958 (Vic).

to be guided not by the words of the legislation but by the words of other judges. He considered that some of these judicially imposed restrictions were without justification given the language of the relevant section.[48]

[88] All of this does not mean that the importance of contractual and property rights can be ignored. But they must be considered in the factual context before the court, rather than as generic fetters on the court's discretion. Contractual rights may well be significant where the original parties to a covenant are still the parties at the time of the s 317 application. And concern about expropriation of property rights may arise where the s 317 applicant is a public body.[49] These are just examples. We think it is important that each application is considered on its own merits, without assuming these considerations arise in every case.

[89] We agree with Cooke J's observation in *Pollard v Williams* that s 317 requires a balancing of policy considerations.[50] The factors he mentions are important, but others, such as environmental factors, may be important in other cases. Further, the recent amendment to s 317(1) makes it clear that issues of fairness may arise in some cases. Given the broad range of situations in which s 317 applications are made, the potential range of relevant matters should not be restricted.

[90] To conclude on this point, s 317 requires a two-stage approach. The court's first task is to determine whether one or more of the grounds in s 317(1) is made out. If so, the second task is to determine whether the discretion to extinguish or modify the easement or covenant at issue should be exercised (and, if so, to determine whether compensation should be payable). The exercise of the discretion to modify or extinguish the easement or covenant requires consideration of all relevant factors (including the power to award compensation). We do not see any intent that any one factor should be disqualifying.

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48 This view has been controversial in Victoria and has not been endorsed in subsequent cases: see *Vrakas v Registrar of Titles* [2008] VSC 281 at [47]–[48]; *Prowse v Johnstone* [2012] VSC 4 at [99]; *Freilich v Wharton* [2013] VSC 533, [2014] ANZ ConvR ¶14-004 at [21]–[24]; and *Morrison v Neil* [2015] VSC 269 at [69] and [106]. See also Peter Butt "Conveyancing and property" (2006) 80 ALJ 12 at 13–14.

49 *A H Properties Ltd v Tabley Estates Ltd* HC Hamilton CP142/92, 3 September 1993 at 37.

50 *Pollard v Williams*, above n 43, at [18]. See above at [81].

Synlait's grounds of appeal

[91] In this Court, Synlait argued that all of the factors in s 317(1)(a)–(f) (except (c)) were met. The arguments based on s 317(1)(e) and (f) were advanced only faintly. They were not the subject of argument or evidence in the Courts below and it is therefore preferable that we do not address them. We will deal first with s 317(1)(d), which provides a useful illustration of the purpose of the covenants, before addressing s 317(1)(a) and (b).

No substantial injury: s 317(1)(d)

High Court

[92] The High Court Judge found that NZIPL would not suffer substantial injury if the covenants were extinguished. He found there would be no injury of a physical kind such as noise or traffic, and no injury of an intangible kind such as impairment of views, intrusion upon privacy, unsightliness or alteration to the character or ambience of the neighbourhood.[51] He also rejected a submission that the covenants were a key part of Mr Ye's decision to purchase the NZIPL land, noting that the price paid for the property had not been disclosed and there was no evidence of the value of the property with or without the benefit of the covenants.[52]

[93] The Judge said the covenants would have "no effect whatsoever on Waikato Council's decision on any application for resource consent to develop a quarry lodged by NZIPL". He disagreed with Mr Ye's stated beliefs that obtaining resource consents to develop a quarry would be more difficult if the covenants were extinguished or modified.[53]

[94] The Judge noted that, because the burdened land was only a small proportion of the Synlait land and the Stuart PC land respectively, both property owners were still able to make submissions (in their capacity as owners of land that is not burdened land) against any application for resource consent and make claims against the quarry

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51 HC judgment, above n 1, at [46].

52 At [47]. The price was disclosed in Mr Ye's affidavit filed in this Court, but this evidence was not admitted: see above at [32] and [35].

53 At [48].

operator, both of which are prohibited by the covenants. He saw this as an indicator that the covenants had no ongoing practical value.[54]

[95] He therefore found that the ground set out in s 317(1)(d) was made out.[55]

Court of Appeal

[96] The Court of Appeal began its analysis by recording that aggregate extraction on the NZIPL land is a restricted discretionary activity. This means any application for resource consent would be determined by reference to s 104C of the Resource Management Act, which provides that the consent authority (the Waikato District Council) may have regard only to matters in respect of which it has restricted its discretion. It noted that the consent authority could grant or refuse the application and, if the application were granted, conditions could be imposed, but only in relation to matters in respect of which discretion had been restricted. Any quarry would also need air discharge consents from the Waikato Regional Council.[56]

[97] The Court noted the evidence that any dairy factory would be sensitive to contaminants including dust. It said there was evidence the existence of a dairy factory could significantly affect the conditions that might be imposed in any resource consent for a quarry and might affect the grant of any consent. It said that if the covenants were extinguished, Synlait would be able to object to the grant of a resource consent.[57]

[98] The Court noted that Stonehill's experts, Mr Comer and Christopher Scrafton, had given evidence that the extinguishment of the covenants would not make it more difficult to obtain resource consents for a quarry. But, the Court said, both of them had made concessions in cross-examination to the effect that the existence of the covenants provided a higher level of protection than the Industrial 2 zoning of the Synlait land.[58]

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54 At [42].
55 At [49].
56 CA judgment, above n 3, at [114].
57 At [115].
58 At [115]–[117].

[99] The Court said that if the covenants were modified or extinguished, allowing the development of the Synlait plant, NZIPL "could well suffer injury of an intangible kind, that is more than insignificant or trifling, when and if they want to establish and operate a quarry". The Court said NZIPL would lose the protection against any interference, restraint, objection or claim in relation to the operation of any quarry it might establish.[59] There could be increased costs in operating the quarry, the Council might require the quarry to be reduced in scale and it was possible NZIPL might not be able to obtain the necessary resource consents.[60]

[100] The Court concluded that the High Court Judge was wrong to find that extinguishment or modification of the covenants so as to permit operation of the Synlait plant would not substantially injure NZIPL.[61]

Limited modification

[101] As noted earlier, the High Court's modification of the covenants amounted to their extinguishment insofar as they affected the Synlait burdened land. It is apparent that the Court of Appeal's focus was on the appropriateness of that order. Synlait has now been substituted for Stonehill as the effective applicant, has given the Synlait undertakings and, through its counsel, has indicated it is content with the covenants remaining in force with only cl 1 of sch 3 deleted.[62] That is the basis on which we assess the appeal.[63]

[102] We acknowledge that the modification of the covenants on the more limited basis just mentioned would still allow for the Synlait plant to be constructed on the Synlait burdened land. But it would also mean the obligations on Synlait to allow NZIPL to carry on quarrying without interference or restraint from Synlait,[64] not to make any claim against NZIPL relating to quarrying,[65] and to refrain from seeking

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59 This assumes the covenants would be effectively extinguished insofar as they affect the Synlait burdened land. The Court did not consider separately the alternative of removing cl 1 of sch 3 but otherwise leaving the covenants intact, which would have avoided this concern. See above at [22].

60 At [118].

61 At [119].

62 This was the alternative order sought in Stonehill's application under s 317: see above at [20].

63 See above at [24]–[26].

64 Clause 3 of sch 3. Schedule 3 to the covenants is reproduced in full above at [17].

65 Clause 4 of sch 3.

enhanced standards relating to dust, noise and vibration, among other things,[66] would remain.

Substantial injury

[103] The inquiry under s 317(1)(d) focuses on whether the extinguishment or modification of the covenant will "substantially injure" the owner or owners of the benefited land. The court must be satisfied that it will not do so. In the present case there is no concern as to substantial injury to Synlait, Stuart PC or Hynds Foundation. Between them, they own about 40 per cent of the benefited land. So the question is whether the Court is satisfied the modification of the covenants will not substantially injure NZIPL.

[104] Section 317(1)(d) contemplates that the benefited owner may be injured by removal of the covenant so long as that injury is not substantial.[67] It was common ground that for the injury to be "substantial", it must be "real, considerable, significant, as against insignificant, unreal or trifling".[68] Australian cases express this in slightly different language, but the substance is the same: the injury must be real and have present substance, rather than merely being theoretical or fanciful.[69]

[105] The injury may be of an economic kind (for example, a reduction in the value of the benefited land), physical kind (for example, being subjected to noise or traffic), or intangible kind (such as impairment of a view, intrusion upon privacy, unsightliness or an alteration to the character or ambience of the neighbourhood).[70]

[106] Assessment of substantial injury requires the court to compare the position of the owner of the benefited land with the covenant in place with the position if the

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66 Clause 6 of sch 3.

67 DW McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (online ed, LexisNexis) at [17.042].

68 *Plato v Ashton* (1984) 2 NZCPR 191 (CA) at 194; and *Jansen v Mansor* (1992) 3 NZ ConvC ¶95-266 (CA) at 192,115.

69 *Re Mason and the Conveyancing Act* (1960) 78 WN (NSW) 925 (SC) at 928; and *Re Stani* VSCFC M10850/1975, 7 December 1976 at 10.

70 *Luxon v Hockey*, above n 32, at [35], citing *Mogensen v Portuland Developments Pty Ltd* (1983) NSW ConvR ¶55-116 at 56,856.

covenant is modified or extinguished.[71] In the present case, that assessment focuses on the impact of the modification on any future application for resource consent for a quarry on the NZIPL land and the operation of such a quarry if one is established.

Quarry development

[107] The High Court Judge said that much of the benefited land would never be developed as a quarry.[72] That is clearly true, because the basalt resource is on the NZIPL land, which is about 60 per cent of the benefited land. The remainder of the benefited land does not have a basalt resource and so will not be quarried. But that does not advance matters far.

[108] The High Court Judge then said that NZIPL's opposition to the application was "to keep its options open".[73] He noted that Mr Ye had said that he had spoken to people about the possibility of developing a quarry, but that NZIPL had no present plans to do so. The preferred option was, the Judge said, the development of a residential village yielding 1,025 lots and housing approximately 2,800 people.[74]

[109] The Court of Appeal was critical of the High Court Judge's approach. It noted that the NZIPL land was still zoned for aggregate extraction and processing and that Mr Ye had given evidence that he and NZIPL may seek to undertake quarrying activities on the NZIPL land.[75] It noted that although Mr Ye (through Havelock Village) sought a change in the zoning of the NZIPL land for residential use, he also sought to retain aggregate extraction as a discretionary activity.[76]

[110] Mr Ye's evidence about the potential for a quarry on the NZIPL land was vague in the extreme. He referred to having spoken to people about developing a quarry, but when cross-examined was unable to name any person to whom he had spoken.[77] It was not, however, put to him that he had no intention of establishing a quarry.

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71 *Re Ulman* [1986] ANZ ConvR 475 (VSC) at 479; *Re Cook* [1964] VR 808 (SC) at 810–811; and *Vrakas*, above n 48, at [35].
72 HC judgment, above n 1, at [34].
73 At [35].
74 At [34].
75 CA judgment, above n 3, at [83].
76 At [91].
77 Mr Ye did obtain a copy of a geological report commissioned by Winstone Aggregates in 1997 and the resource consent application made by Winstone Aggregates in 1998.

[111] Mr Ye's unchallenged evidence, vague though it was, was that the development of some sort of quarry on the NZIPL land was a possibility. The fact that NZIPL's sister company, Havelock Village, applied for the zoning of the NZIPL land to be changed from rural to residential appears to indicate that this is the preferred option and the best use of the NZIPL land. But Mr Ye's evidence was that even in the case of a residential development, it was possible that a quarry on a small scale could be established to provide aggregate for roading for the projects of NZIPL and its sister companies in the immediate area. This could be done before the residential development took place.

[112] NZIPL wishes to keep its options open in relation to quarrying on the NZIPL land and the prospect of its seeking to do so cannot be ruled out. However, no action is currently being taken to establish a quarry and no resource consent application for a quarry has been made. The present focus is on having the NZIPL land zoned for residential development. If an attempt were made to obtain resource consent for a quarry, the scale of the proposed quarry would be significantly smaller than what Winstone Aggregates planned for, but ultimately abandoned.[78]

Obtaining resource consent for quarrying on the NZIPL land

[113] To assess the planning implications of removing from the covenants the restriction on use of the Synlait burdened land, the following must be considered:

(a) the environment in the area adjacent to the NZIPL land, assuming the covenants remained unmodified; and

(b) the likelihood of obtaining a resource consent for a quarry, assuming the covenants remained unmodified, as against the likelihood assuming it was modified.

[114] The evidence of Mr Comer (Synlait's planning expert) in the High Court was that an application for resource consent to undertake quarrying operations on the NZIPL land would require consideration of a number of factors unrelated to the

[78] Mr Ye said it would be "much, much smaller" than the quarry that had been proposed by Winstone Aggregates.

presence or absence of the Synlait plant. Quarrying is a restricted discretionary activity and falls under r 35 of the District Plan. An application for resource consent is assessed under s 104 of the Resource Management Act in terms of the matters over which the Waikato District Council has restricted the exercise of its discretion. These are provided for in r 35.8.

[115] Mr Comer said that an application for resource consent would need to appropriately and satisfactorily address the following factors:

- How site layout (and buildings) would respond to steep topography and land stability requirements to be determined through robust geotechnical and civil engineering investigation, reporting and assessment;

- How site layout (and buildings) would respond to the prominent and elevated nature of the site through robust landscape and visual investigation, reporting and assessment, including proposed landscape treatment and screening required to mitigate landscape and visual effects;

- The noise, lighting and vibration effects of quarrying activities given close proximity of the site to existing and established rural-residential activities, including the effects of traffic noise and vibration; machinery noise and vibration; blasting; and site layout, design and lighting;

- Traffic effects, including the effects of establishing an Aggregate Extraction activity on the land, including during the construction of buildings, site access roads and the upgrade of rural roads in the surrounding area; truck movements to and from the site required to remove quarried material; truck movements to and from the site required to import clean fill material to rehabilitate the site; truck and vehicle movements within the site during operations; and the effects of additional traffic generation upon the local road network, but more especially on the safe operation of State Highway 1;[79]

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79 Currently, the NZIPL land has access to State Highway 1 from Pioneer Road via Cole Road and Bluff Road. These are rural roads; they are narrow, windy and of steep grade. There is also only a short acceleration lane for traffic joining the northern motorway. Mr Comer said that whether quarry trucks could safely exit and join State Highway 1 would "require careful consideration and assessment" and consultation with the New Zealand Transport Agency. The same view was expressed in a report on traffic options completed in 2008. Mr Ye says he is in discussions with Yashili about an extension of McDonald Road over Yashili land so that trucks from the quarry could access State Highway 1 via a more suitable onramp. However, this would require quarry trucks to travel along the main street of Pōkeno, which would be a significant issue with any resource consent application. There was evidence that an extension of McDonald Road would be difficult because of the gradient of the land. To provide access to the NZIPL land, any extension would also have to cross either the Synlait or Rainbow Water land in addition to the Yashili land.

- The effects of quarrying activities on natural hazards, in particular downstream flood effects, and land stability effects within the site and on neighbouring sites;

- The ecological and water quality effects arising from Aggregate Extraction activities, in particular on the aquatic habitat values of existing watercourse(s), and on any native vegetation within the site; and

- The natural and cultural heritage values of the site and surrounding area, in terms of the actual and potential adverse effects on the natural character of rivers and lake and their margins; the protection of outstanding natural features and landscape; areas of significant native vegetation and significant habitats of native fauna; and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, [wāhi] tapu and other taonga.

[116] Mr Comer considered that these factors would raise significant issues that the Council would want to assess if a resource consent application was made for aggregate extraction activity on the NZIPL land. He also considered that an application would be of interest to tangata whenua because of the presence of a water course on the land, the existing natural and ecological landscape values of the land and the surrounding area, and the potential for items and sites of cultural significance to be discovered during land disturbance.

[117] Mr Comer emphasised the traffic issues, which he said would raise a number of key issues for the New Zealand Transport Agency (NZTA) and, potentially, for KiwiRail. He concluded as follows:

> As a result, an application would in my view more likely than not be publicly notified; such a process opens up a proposal to full public scrutiny through a submissions process and subsequent Council hearing. Given the significance of the issues raised by an Aggregate Extraction activity, I consider that an application for resource consent would be far from straightforward in terms of its process or complexity. There would be no guarantee that consent would be granted by Council on this basis, whilst a decision to grant, if made, could be challenged on appeal through the Environment Court.

[118] The Court of Appeal said Mr Comer had conceded in cross-examination that the existence of a dairy factory on the Synlait burdened land could:[80]

(a) make it harder to obtain resource consent for a quarry if a submission was made opposing consent;

(b) lead to more stringent conditions on any consent;

(c) be one reason why consent was refused; and

(d) make it harder to get air discharge consents.

[119] Mr Miles took issue with the Court of Appeal's interpretation of Mr Comer's evidence. Mr Miles said that in fact, Mr Comer's position on the above matters in cross-examination was as follows:

(a) The Council would undertake an assessment on the wider receiving environment and it was difficult to say what effect the Synlait plant would have without knowing what the quarry activity would be. The question put to Mr Comer assumed Synlait's opposition to the resource consent application. While that was possible if the covenants are extinguished in relation to the Synlait burdened land, that is not so if the covenants remain in place, with cl 1 of sch 3 removed.

(b) A number of factors could lead to tighter controls.

(c) The Synlait plant would not be the determinative factor on whether resource consent was granted, because the effects of any quarry would be more wide-ranging.

(d) Air discharge consents would require an assessment of the effect on the wider receiving environment and this could not be known in the absence of a proposal for a quarry.

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[80] CA judgment, above n 3, at [115].

[120] We accept that the Court of Appeal's summary of the points elicited from Mr Comer's cross-examination did not acknowledge the important qualifications in what he actually said. But we do not see the position quite as starkly as suggested by Mr Miles. Mr Comer did accept the presence of the Synlait plant could make obtaining a resource consent for a quarry harder, but said it would not be a determinative factor. He also accepted the plant may lead to tighter controls, but, again, said a number of other factors could also do so.

[121] Another witness called by Stonehill, Mr Scrafton, was cross-examined about the impact of the Synlait plant on any future resource consent application for a quarry on the NZIPL land. The Court of Appeal said Mr Scrafton had acknowledged that it would be easier to obtain resource consent and operate a quarry if the Synlait plant did not exist.[81] Mr Miles said this overstated his evidence. We agree. In fact, Mr Scrafton said the presence of a dairy plant on the Synlait burdened land would be a factor amongst a number of others, such as residential development nearby, traffic issues and the like. He did not know enough about the sensitivity of a milk processing factory to suggest it would be a "silver bullet".

[122] The planner who gave expert evidence for NZIPL, Mr Matthews, broadly agreed that the relevant issues were those noted by Mr Comer,[82] but said there would also be scope for the Council to consider the effects on adjacent authorised activities, such as a milk processing plant, in the context of the matters over which it had reserved its discretion. He gave examples such as tighter controls over site layout, screening, truck movements and blasting (which may cause vibration or dust).

[123] Mr Matthews said that in the same way the new residential subdivisions around Pōkeno raised issues of interface, the presence of a food processing facility in proximity to a quarrying proposal would require consideration of the potential effect of a quarry on that activity. He said this could lead to tighter standards being imposed on the quarrying operation. He said the regulatory requirements applying to dairy factories could be the basis of a submission opposing a resource consent for a quarry

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81 At [117].
82 See above at [115].

on the NZIPL land. Any application for discharge consents from the Waikato Regional Council would raise similar issues.

[124] Mr Matthews also referred to the cumulative effect of the Synlait plant on matters such as traffic and air discharges (the emission of particulates). In relation to discharges, he noted that the capacity of the Pōkeno area to accommodate further discharges (such as discharges from a quarry on the NZIPL land) may be restricted because of the Synlait plant. But the change in zoning permitting industrial uses in the area adjacent to the NZIPL land has facilitated emissions. Mr Matthews does not suggest this could be a decisive or even material factor preventing the granting of a resource consent for a quarry on the NZIPL land that would, absent the Synlait plant, have been obtained. There is also no evidence of any cap on air discharges in the area or the rate of discharge from the Synlait plant or a quarry.

[125] Another witness for NZIPL, Sir William Birch, expressed the view that a resource consent for a quarry should be able to be obtained, but that the presence of the Synlait plant was a "complicating factor". However, he said that until a resource consent application for the quarry was prepared, it was impossible to conclude how the Council might respond to a particular application or the conditions that might be imposed. Without an application, he said it is also impossible to determine what impact the infant formula plant on the Synlait burdened land would have on that process. His conclusion was that, if the covenants were modified to allow the construction of the Synlait plant, that would certainly not make it any easier to obtain resource consent for a quarry or make the conditions less stringent. He said if the covenants were extinguished, such that Synlait became entitled to make submissions on an application for resource consent for a quarry, he had no doubt this could make it significantly more difficult to obtain such a consent (or result in more stringent conditions being imposed).[83]

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[83] This assumes that Synlait could not make a submission in its capacity as owner of the Synlait benefited land. Woolford J considered that it could: HC judgment, above n 1, at [42]. We do not consider it necessary to resolve the point.

[126] Sir William said in cross-examination that he was not suggesting that the Synlait plant was the major issue in relation to a resource consent application for a quarry. Rather, it was an unknown.

[127] In addition to this, Mr Ye also gave evidence based on his experience as a director of two dairy companies, GMP Dairy Ltd and GMP Pharmaceuticals Ltd. Mr Ye said he is knowledgeable about food safety requirements having established three dairy factories in Australia and New Zealand, including an infant formula plant in New Zealand. He said infant formula plants (such as the Synlait plant) require higher standards than plants producing general dairy products and are sensitive to possible contaminants. He said that, in his experience, a dairy factory and a quarry would be incompatible and should not be located on neighbouring properties.

[128] As noted above at [61](a), Yashili has an infant formula manufacturing facility, similar to that of Synlait, near the NZIPL land. The Yashili facility is across the road from the Synlait plant. Mr Zhao, the Yashili general manager at the time the plant was established, said that in locating its plant in this area, Yashili took a calculated risk that there would never be a quarry on the NZIPL land. However, he said the plant is designed so that dust contamination will not be a problem affecting its future operation even if a quarry is established. In addition, Yashili is proposing to build another dairy factory on land adjoining the land on which its current plant is situated. That new factory will abut the NZIPL land at one corner. Winston Nutritional is also planning to construct a milk product plant on the land behind the Yashili land. In addition to these dairy plants, there is also a concrete pipe manufacturing plant on the Stuart PC benefited land operated by Hynds Pipe Systems.

[129] Mr Zhao said if he was still the manager of the Yashili plant, he would oppose resource consent for a quarry because of the risk of dust from a quarry contaminating the plant. We understand that Mr Zhao is now the manager of Winston Nutritional. Given his views about the possibility of a quarry on the NZIPL land, it can be expected that an application for resource consent for a quarry would be opposed by Yashili and/or Winston Nutritional.

[130] The evidence of Mr Matthews, Sir William and Mr Ye does not take into account the proximity of the Yashili factory and Winston Nutritional plant to the NZIPL land.[84] So all of the considerations they raise about the incompatibility of quarrying and dairying are already features of the environment that the Waikato District Council would have to consider in the event of a consent application for a quarrying operation on the NZIPL land. The focus of attention for a court considering whether substantial injury is caused to NZIPL by the modification of the covenants is the *additional* difficulty that the modification of the covenants would cause were NZIPL to make a resource consent application for a quarry on its land.

[131] The focus of the evidence of Mr Matthews and Mr Ye is also on the presence of the Synlait dairy factory, rather than on the effect of modifying the covenants in the manner that allows the factory to be located on the Synlait burdened land. It does not take into account the continued operation of the other provisions of the covenants, in particular those which require Synlait to allow quarrying activities to be carried out on the NZIPL land without any interference or restraint from Synlait, the restraint on Synlait bringing any claim against NZIPL in relation to quarrying activities, and the requirement that Synlait refrain from making any submissions seeking to have applied to the quarry any noise, dust and/or vibration standards more stringent than those already in the District Plan.

[132] The evidence now also needs to be seen in light of the Synlait undertakings.[85]

[133] Mr Galbraith argued that the likely effect of the Synlait plant on any resource consent application for a quarry differed from the effect of the Yashili plant. He referred us to the evidence of Mr Zhao that the most sensitive aspect of both plants was the "high care zone" where the spray dryers and filling room are located. These suck in air and so are sensitive to contamination. As is apparent from the map in the appendix, the Yashili high care zone is further away from the NZIPL land than the Synlait one. Mr Zhao's evidence was that Yashili had located the high care zone as far from the NZIPL land as possible. Mr Galbraith said this meant the Synlait plant

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[84] In cross-examination, Sir William acknowledged the presence of the Yashili and Winston Nutritional plants would affect an application for resource consent for a quarry on the NZIPL land.

[85] See above at [23].

would be of greater concern in the event that resource consent for a quarry was sought and at greater risk of contamination if quarrying occurred on the NZIPL land. He added that unlike Yashili's high care zone, the Synlait high care zone is susceptible to dust carried by the prevailing wind.

[134] All of the experts accepted that, until an actual application for resource consent was made, it was difficult to assess what influence the presence of the Synlait factory would have. It may also depend on future developments that occur between now and the time at which a resource consent application for quarrying is made, if that ever happens.

Summary and conclusion

[135] Drawing these threads together, we assess the position under s 317(1)(d) as follows:

(a) The possibility of NZIPL seeking to establish a quarry on its land cannot be discounted, but there is real uncertainty as to whether NZIPL will ever do so. Development of the NZIPL land for residential purposes is its preferred use but even if that occurs, a quarry could still be part of NZIPL's plans. If NZIPL does decide to pursue a plan to establish a quarry on the NZIPL land, it will be of a much smaller scale than the quarry proposed by Winstone Aggregates. Despite this, any such plan is likely to face both cost and delay in obtaining a resource consent, with no certainty of success, irrespective of the presence of the Synlait plant.

(b) If NZIPL does not make an application for resource consent to establish a quarry, the modification of the covenants obviously will not substantially injure NZIPL.

(c) Obtaining the necessary resource consents for a quarry, if an application is made, will not be easy. If NZIPL does make such an application, it will likely face opposition from Yashili and/or Winston Nutritional. The impact on nearby residences will weigh heavily in the Waikato

District Council's decision on any consent application. Synlait's obligations under the covenants not to interfere with a quarry operation and not to seek more stringent noise, dust and/or vibration standards are now supplemented by its undertakings. The Synlait plant will be part of the receiving environment, but its presence will not substantially increase the barriers facing any application for resource consents for a quarry given that Synlait itself will not object. If Synlait gives its written approval to the application for resource consent for a quarry, the environmental effects on it will be disregarded by the Waikato District Council when making a decision on the application.[86]

(d) While it cannot be stated with certainty that the presence of the Synlait plant on the Synlait burdened land would make *no* difference to NZIPL's chances of obtaining resource consents, it is clear that any difference it would make would not be substantial. This is because of the other dairy factories that will be affected and the restraints the covenants and undertaking place on Synlait. That being the case, the impact of the small reduction in the chance of obtaining consent on the value of the NZIPL land is unlikely to be significant.

[136] Overall, there is a relatively low chance an application for resource consent for a quarry will be made. If one is made, it can be envisaged that obtaining the required consents will be a complex and difficult process. The presence of the Synlait plant on the Synlait burdened land will have a relatively low level of impact on any such application. The combination of these factors leads us to conclude that the proposed modification of the covenants will not substantially injure NZIPL.

[137] We are therefore satisfied that the ground in s 317(1)(d) is made out.

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[86] Resource Management Act 1991, s 104(3)(a)(ii). Synlait submitted the undertakings required it to give written approval to a resource consent application for a quarry. As we see it, the letter containing the undertakings is, itself, written approval: *Queenstown Property Holdings Ltd v Queenstown Lakes District Council* [1998] NZRMA 145 (EnvC) at 170; *Waiheke Island Airpark Resort Ltd v Auckland City Council* EnvC A88/09, 29 September 2009 at [74]; and *Coneburn Planning Ltd v Queenstown Lakes District Council* [2014] NZEnvC 267. It may also be argued that the remaining clauses of sch 3 to the covenants amount to written approval.

Covenant ought to be modified because of changes: s 317(1)(a)

[138] Section 317(1)(a) deals with changes that satisfy the court that the covenant "ought" to be modified or extinguished. The type of changes dealt with by this paragraph are divided into three categories and we will deal with them separately. As noted in *Okey v Kingsbeer*, the focus is not on the fact of change but on the impact of the change on the benefit or burden flowing from the covenant.[87]

Change in nature or extent of use: s 317(1)(a)(i)

High Court

[139] The High Court Judge considered that there were a number of changes relevant to this criterion. He pointed to the subdivision and sale of large areas of the benefited land, meaning that much of the benefited land would not be used for a quarry,[88] and the proposal under the PWDP to rezone the NZIPL land rural with extractive industry as a discretionary activity.[89] The Judge noted that Mr Ye, through Havelock Village, is seeking to have the NZIPL land rezoned residential and only opposed the application for modification to keep the option of a quarry open.[90] Finally, he considered that the use of the Synlait burdened land had "changed beyond recognition". The land had been rezoned Industrial 2. Yet the covenants described a use of the land inconsistent with this zoning and the actual use of the Synlait burdened land.[91]

Court of Appeal

[140] The Court of Appeal disagreed with all elements of the High Court decision. The Court did not consider that the subdivision and sale of parts of the benefited land, and the fact that quarrying would not occur on large parts of it, were changes that required modification or extinguishment of the covenants.[92] It noted that there had not been any change to the use of the NZIPL land and quarrying remained a possibility.[93] It said the High Court Judge overstated the change in use of the burdened

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87 *Okey v Kingsbeer*, above n 42, at [53].
88 HC judgment, above n 1, at [29] and [34].
89 At [30].
90 At [31]–[32] and [35].
91 At [36].
92 CA judgment, above n 3, at [82].
93 At [83].

land. The only relevant change in use of the burdened land was that foreshadowed by the Synlait plant. A change in use by an applicant acting in breach of a covenant cannot be used as leverage to obtain modification or extinguishment of a covenant.[94] It saw the planning changes and the fact that NZIPL's sister company had sought a plan change to allow residential development on the NZIPL land as irrelevant.[95] It concluded that the requirements of s 317(1)(a)(i) were not met.[96]

Our assessment

[141] We agree with the Court of Appeal that some of the changes taken into account by the High Court Judge were not changes to the nature or extent of use being made of either the benefited or burdened land. In particular, we agree that the change in use of the Synlait burdened land precipitated by Synlait acting in breach of the covenants cannot be used as leverage to obtain modification of the covenants.[97]

[142] It was undoubtedly relevant that large tracts of the benefited land had ceased to be part of the block that was to be developed by Winstone Aggregates as a quarry, and had now been put to other uses by Synlait and Stuart PC. But we do not see those changes, of themselves, as leading to a conclusion that the covenants ought to be modified. As Mr Galbraith said, despite the various subdivisions, the basalt resource is entirely within the NZIPL land.

Change in character of neighbourhood: s 317(1)(a)(ii)

High Court

[143] The High Court Judge considered this ground was made out. He referred to the considerable increase in the Pōkeno population;[98] the establishment of the Yashili plant and the impending establishment of the Winston Nutritional plant;[99] and

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94 At [86].
95 At [88] and [91].
96 At [94].
97 *A H Properties*, above n 49, at 39; *Hurley v Harvey* HC Auckland HC170/98, 20 May 1999 at 14; and *Luxon v Hockey*, above n 32, at [20].
98 HC judgment, above n 1, at [37]. See above at [60].
99 At [38]

Plan Change 21, which rezoned a former vineyard property to the northwest of the NZIPL land as residential.[100]

Court of Appeal

[144] The Court of Appeal accepted that Pōkeno had undergone significant growth since the covenants were created, with residential zones now closer to the NZIPL land. It accepted that the establishment of the Yashili plant, the proposed Winston Nutritional plant and the Hynds concrete pipe manufacturing plant had all changed the character of the neighbourhood.[101] But the Court was not persuaded these changes required the covenants to be modified or extinguished. The Court noted the long term of the covenants (200 years) and said that change must have been contemplated. The Court said that the burden on the burdened land had not changed, only its zoning and the aspirations of the owner.[102]

Our assessment

[145] The Court of Appeal dismissed the relevance of what it accepted were significant changes to the neighbouring area. One of its reasons was that the neighbouring land had never been subject to the covenants.[103] But that is invariably the case; the statutory question is whether the changes in the character of the neighbourhood are such that the covenant ought to be modified. We do not think the fact that other nearby land is not subject to the covenants has any bearing on that question.

[146] The Court noted that the owners of neighbouring land could always have objected to a quarry.[104] That is true, but it fails to acknowledge the fact that the subdivision of the benefited land has brought about a situation where there are now a number of owners of land adjoining, or close to, the potential quarry area who would be affected by a quarry. This was not the case when the covenants were entered into. It is a notable feature of this case that the areas of the benefited land other than the

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100 At [39]. See above at [57].
101 CA judgment, above n 3, at [98].
102 At [99].
103 At [99].
104 At [99].

land containing the basalt resource were not made subject to restrictive covenants like the covenants in issue in this case, even though those areas are adjacent to the area containing the basalt resource and, in places, closer to it than the burdened land.[105]

[147] We do not see any reason why the subdivision of the benefited land and the changes of ownership of subdivided areas of that land described earlier should not be seen as relevant factors in relation to s 317(1)(a)(ii).

[148] There was some dispute about the relevance of zoning changes in this context. Recent High Court authority supports the proposition that zoning changes may be relevant under s 317(1)(a)(iii), but not s 317(1)(a)(ii). That was the position reached by Katz J in *North Holdings Development Ltd v WGB Investments Ltd*.[106] But the circumstances of that case differ from those in the present case.

[149] In *North Holdings*, the "neighbourhood" was an area earmarked for a future development. When the covenant in issue was entered into, the area consisted of vacant land. The land was still vacant when the s 317 application was heard, albeit that there were now utilities and roading. There had been a zoning change from heavy industrial to mixed use, but the "neighbourhood" was otherwise the same. Katz J considered that, in those circumstances, it was artificial to say there had been a change in the character of the neighbourhood.[107] However, she considered a zoning change was appropriately taken into account under s 317(1)(a)(iii).[108]

[150] In the circumstances of this case, the reasons given by Katz J for disregarding zoning changes in relation to s 317(1)(a)(ii), but allowing them to be taken into account under s 317(1)(a)(iii), do not apply. We consider planning changes may be relevant to both. Unlike the situation in *North Holdings*, the planning changes in this case have contributed to the change in the character of the neighbourhood from rural land uses to major industrial and residential developments.

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105 When Winstone Aggregates sold off what is now the Hynds land, it did not first register a restrictive covenant to protect the possibility of a quarry being developed on the area containing the basalt resource (now the NZIPL land). And when it sold the NZIPL land, it did so without registering such a restrictive covenant on what is now the Synlait benefited land, which it still owned.

106 *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670.

107 At [27].

108 At [30]. This analysis was applied in *Re Barfilon Investment Ltd* [2019] NZHC 780 at [30]–[31].

[151] Having said that, we make it clear that a change in zoning is a factor that can be taken into account, not a decisive factor. The mere fact that the zoning of burdened land and the land around it has changed does not mean the criterion in s 317(1)(a)(ii) is met; on its own, a zoning change is unlikely to amount to a change in the character of a neighbourhood.[109] If that were not the case, there is a risk of undermining the purpose of covenants designed to resist the impact of zoning changes. A change in zoning can, however, be brought into consideration when determining whether the characteristics of the neighbourhood have changed.

[152] In this case, the zoning change that affected the burdened land and the neighbourhood around it was supported by Winstone Aggregates as the then owner of the benefited land and potential quarry area.[110] It predated Synlait's ownership of the burdened land, so it was not something Synlait caused to occur and then sought to gain an advantage from. It has led to the development of Pōkeno from a village with a population of 200–300 to a town of 3,000 people and the industrial development in the area around the NZIPL land. Restricting the use of farmland to farming activities is one thing; restricting the use of land that is close to a residential area and part of an industrial zone, including major manufacturing operations, and rated according to its increased value, is another. These are significant changes to the neighbourhood.

[153] The effect of the zoning change in relation to the burdened land is that the permitted uses of the land under the covenants are now non-complying activities.[111] NZIPL argues that there was nothing incongruous about requiring Synlait to restrict the use of the Synlait burdened land to grazing: it said this was no more incongruous than grazing occurring on land surrounded by a quarry. That seems to us to ignore the other changes that have occurred in the neighbourhood.

[154] We accept NZIPL's submission that the Council took account of the potential effects of a quarry when it approved the change in zoning. That means it must have considered the development of a quarry on the NZIPL land remained a possibility,

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109 A zoning change is also unlikely to be, on its own, sufficient to make out the ground in s 317(1)(a)(iii).

110 See above at [56].

111 However, Synlait could have avoided the practical impact of this. If grazing had continued uninterrupted on the burdened land, an existing use right would have applied: Resource Management Act, s 10.

despite the new planning status of the land around it. We do not, however, see that as reducing the significance of the changes in the neighbourhood identified above.

[155] Taking all of these factors into account, we are satisfied that the changes in the neighbourhood to which we have referred are such that the covenants ought to be modified.

Other relevant changes: s 317(1)(a)(iii)

High Court

[156] The High Court Judge considered that the utility of the covenants had been seriously compromised by the rezoning of the burdened land and its merger with parts of the benefited land.[112] The Judge noted that Synlait could legally build its plant on the benefited part of its land which is much closer to the NZIPL land.[113] Finally, the fact that both Synlait and Stuart PC could object to a quarry in their capacity as owners of benefited land meant the covenants had no practical purpose.[114]

Court of Appeal

[157] The Court of Appeal disagreed with that analysis: it considered the utility of the covenants was not compromised by the rezoning of the burdened land or its merger with the benefited land.[115] Nor did it consider that the fact that Synlait could have built its factory on the Synlait benefited land was relevant. It also doubted the factual accuracy of that proposition.[116] It therefore determined that this ground was not engaged.[117]

Our assessment

[158] The Court of Appeal described this as a catch-all provision, allowing for consideration of foreshadowed changes that are almost certain to come about.[118] We

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112 HC judgment, above n 1, at [40].
113 At [41].
114 At [42]. See above at n 83.
115 CA judgment, above n 3, at [103].
116 At [104]–[105].
117 At [106].
118 At [101], citing *Luxon v Hockey*, above n 32, at [28].

agree it is a provision of wide scope,[119] but on the facts of the present case we do not think there is anything in this ground that adds to the matters we have taken into consideration in relation to s 317(1)(a)(ii). We agree with the Court of Appeal that there was no evidence supporting the view that Synlait could have built its factory on the Synlait benefited land. If it could have done so, one would have expected it would have, so as to avoid the present dispute.

Impediment to reasonable use: s 317(1)(b)

High Court

[159] The High Court Judge found that the continuation in force of the covenants would impede the reasonable use of the burdened land in a different way or to a different extent from that which could reasonably have been foreseen when the covenants were entered into.[120] The Judge said the parties only ever foresaw the burdened land being used for grazing or lifestyle farming when the covenants were created. He said while the impediment imposed by the covenants remained the same, the extent of it was now different. Retaining 8 ha of grazing land in the middle of an 80 ha industrial zone containing 40-metre-high processing plants and warehouses was not only incongruous, but could not have been foreseen.[121] In addition, the purpose of the covenants was to enable aggregate extraction to be undertaken in a way that minimised reverse sensitivity effects. The industrial zone now fulfils this purpose.[122]

Court of Appeal

[160] The Court of Appeal considered that the impediment to the reasonable use of the burdened land had not changed since the covenants were entered into. The covenants continue to provide a higher level of protection to the benefited land than the zoning alone. Further, the term of the covenants is such that restrictions on future use of the burdened land must have been foreseeable. Stonehill purchased the land with the knowledge of the covenants and knew that NZIPL relied on them.[123]

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119 As we note above at [150]–[151], changes in zoning may also be relevant under this ground.
120 HC judgment, above n 1, at [43].
121 At [44].
122 At [45].
123 CA judgment, above n 3, at [110].

Our assessment

[161] NZIPL emphasised that s 317(1)(b) focuses on whether the nature or extent of the impediment has changed, not whether the nature or extent of the reasonable use of the land has changed. That is true, but there is nothing in the Act to suggest reasonable use is static. Where the reasonable use of the land changes, as has occurred here, that becomes relevant to the assessment of the nature and extent of the impediment. A change in zoning may be relevant in assessing the change in the nature or extent of the impediment.[124]

[162] In this case, the restrictions on the use of the burdened land to grazing and forestry are the same restrictions that have applied since the covenants were entered into. But the reasonable use of the burdened land has changed because of the changes in the zoning of the burdened land and in the neighbourhood generally, which has changed the nature and extent of the impediment.

[163] When the covenants were entered into, the burdened land was part of a farming operation and the nature and extent of the impediment was to prevent the building of a further dwelling and to restrict the farming operations to their current state. Now that the zoning changes have occurred, the activities that are permitted on the burdened land are no longer permitted under the zoning, so that it would now be necessary to obtain resource consent for grazing or forestry operations. In the absence of such a consent, the covenants would prevent the burdened land being used at all. As noted earlier, it was only when grazing on the Synlait burdened land stopped, presumably when construction of the Synlait plant began, that this problem took on practical significance because until then an existing use right would have applied.[125]

[164] We therefore disagree with the Court of Appeal that there has been no change to the nature or extent of the impediment created by the covenants. Nor do we agree that the fact that Stonehill purchased the land with knowledge of the covenants makes s 317(1)(b) inapplicable. Given that any prudent purchaser of land will have searched the title, it can be expected that an applicant under s 317 will have known (or ought to

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[124] Katz J in *North Holdings* also appeared to consider that a change in zoning was relevant under s 317(1)(b): *North Holdings*, above n 106, at [33]. See also *Re Barfilon*, above n 108, at [35].

[125] See above at n 111.

have known) of the covenant when buying the land. If that is a disabling factor, it will be a disabling factor in virtually every case.

[165] We also disagree with the Court of Appeal that the changes that have occurred were reasonably foreseeable when the covenants were entered into. The changes to Pōkeno have been the result of plan changes that occurred in September 2012, and the evidence was that Pōkeno was not identified for significant growth until 2007. We do not believe that this could have been reasonably foreseen when the covenants were entered into.

[166] We conclude that, although the covenants continue to restrict the use of the burdened land in the same way as they always have, the impediment on the use of that land is now greater because its potential uses and, given the nature of the neighbourhood, its reasonable uses, have expanded in a way that would not have been foreseen when the covenants were entered into.

Conclusion: grounds for modification made out

[167] We are satisfied the grounds in s 317(1)(a)(ii), (b) and (d) are made out. We now turn to the second stage and consider whether the discretion to modify the covenants should be exercised in Synlait's favour.

Discretion

[168] In *Re University of Westminster,* the Court of Appeal of England and Wales observed, in relation to the equivalent United Kingdom provision, that "[a] finding of fact that one or more of the statutory grounds exists is likely, of itself and without more, to provide a good reason or reasons for making an order".[126] That appears to reflect the approach to cases under s 317 and its predecessors. Indeed, Mr Miles told us there are no New Zealand cases where the court, having found that one (or more) of the grounds in s 317(1) has been made out, has exercised its discretion to refuse to extinguish or modify the easement or covenant.

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[126] *Re University of Westminster* [1998] 3 All ER 1014 (CA) at 1024 per Chadwick LJ. The equivalent provision is s 84 of the Law of Property Act 1925 (UK).

[169] However, Mr Galbraith argued that even if the Court were to find that one or more of the grounds set out in s 317(1) was made out, it should nevertheless exercise its discretion against extinguishing or modifying the covenants. He relied on the three principles applied by the High Court in *Affco*, which we have set out above.[127] He argued that where an applicant acquires land knowing it is subject to a covenant, but seeks to use the land in a way that requires alteration to the rights conferred by the covenant, this will weigh heavily against modification.[128] Mr Galbraith also argued that where a landowner makes a business decision to ignore their legal obligations, the discretion should not be exercised in favour of that landowner, except to a very limited extent.[129]

[170] Mr Galbraith said on the facts of the current case, the Court should exercise its discretion against modification or removal because:

(a) The covenants have a continuing purpose.

(b) The covenants have a term of up to 200 years, and have been in existence for only 20–22 years.

(c) Stonehill and Synlait acquired the burdened land knowing it was subject to the covenants. Synlait has constructed the Synlait plant on the Synlait burdened land in deliberate breach of the covenants for its own financial benefit.

(d) Once the covenants have been extinguished or modified, they cannot be replaced in the event that the Synlait plant adversely affects resource consent applications for a quarry.

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127 *Affco*, above n 33, at [136]. See above at [69](b).

128 Referring to *A H Properties*, above n 49, at 39; and *Purdie v Truckell* [2016] NZHC 1231, (2016) 17 NZCPR 499 at [43].

129 Relying on *Luxon v Hockey*, above n 32, at 139.

[171] We address those factors as follows:

(a) As is apparent from our analysis of the s 317(1) grounds, we do not consider that the covenants have a continuing purpose, or at least one which is of sufficient significance to justify the refusal to exercise the discretion in favour of modification of the covenants.

(b) We accept that the terms of the covenants may be a relevant factor. But we do not see the term of the covenants as a matter of great significance in the present case, given our view that they do not have a substantial continuing purpose.

(c) We accept that Synlait's conduct in making preparations for the construction of the Synlait plant prior to the High Court hearing could be seen as a matter that counts against it. We address this question of disentitlement in more detail below.[130]

(d) It is, of course, true that once the covenants have been extinguished or modified, they cannot be replaced. But the basis of this Court's finding that the jurisdiction under s 317(1)(d) is engaged proceeds on the basis that any harm to NZIPL will be insubstantial. In short, we do not see it as likely that a decision as to the granting of a resource consent or decisions as to the regulation of the quarry, if one is ever established, will be substantially influenced by the modification of the covenants by the deletion of cl 1 of sch 3. And the power to award compensation under s 317(2) is designed to deal with any damage or loss caused by the permanent extinguishment or modification of a covenant.

[172] Mr Galbraith pointed out that Synlait had begun construction of the Synlait plant before the High Court judgment and had continued with the construction after the favourable decision in the High Court notwithstanding warnings from NZIPL that an appeal would be pursued. He said this should count against Synlait in the exercise of the discretion under s 317. We do not see the continuation of construction after the

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130 At [172]–[173].

High Court judgment as involving any disentitling conduct. At that time, Synlait had the benefit of a High Court judgment extinguishing the covenants insofar as they applied to the Synlait burdened land. It therefore acted lawfully. It did, however, take a risk as to the outcome of the appeal, either in the Court of Appeal or this Court.

[173] Even if Synlait's conduct was unwise, we do not think it would be appropriate to refuse modification to punish Synlait. Synlait has established that the modification of the covenants will not substantially injure NZIPL. As noted by Steven Gasztowicz in his text on covenants, where modification would not cause injury, the conduct of the applicant will not generally have had any detrimental effect.[131]

[174] We are satisfied that there is no substantial reason to decline to exercise the jurisdiction conferred on the Court by s 317 in the present case. We take into account that not just one, but three, of the grounds in s 317(1) are made out in the present case.

[175] We therefore would have allowed the appeal and made an order modifying the covenants by deleting cl 1 of sch 3 insofar as it relates to the Synlait burdened land.

Compensation

[176] In the High Court, NZIPL submitted that compensation should be payable, and that the amount of compensation should be an amount equal to the difference between the price paid by Stonehill for the land and the price paid by Synlait when it purchased the land from Stonehill. In this regard, it relied on the decision of the Court of Appeal in *MacRae v Walshe*.[132] Stonehill submitted that no compensation should be awarded, because NZIPL would not suffer any loss as a result of the covenants being extinguished. It submitted that the correct approach was to first identify whether there was any actual detriment to NZIPL as a result of the extinguishment of the covenants. Then the court should consider whether or not there are other factors of benefit or detriment to either side that would affect what one or the other would have been willing to pay in hypothetical negotiations.[133]

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131 Steven Gasztowicz *Scammell and Gasztowicz on Land Covenants* (2nd ed, Bloomsbury, Haywards Heath (UK), 2018) at [16.130]–[16.131].

132 *MacRae v Walshe* [2013] NZCA 664, (2013) 15 NZCPR 254 at [52]–[60].

133 Relying on *Cambray North Island Ltd v Minister of Land Information* (2011) 12 NZCPR 721 (HC) at [28]; and *North Holdings*, above n 106, at [71].

[177] The High Court Judge said it did not matter which approach was adopted, because NZIPL would not suffer any loss as a result of the extinguishment of the covenants as they were of little practical value. He noted that NZIPL had produced no evidence to support a claim for compensation.[134]

[178] The Judge said that the "major factor" in his decision was that Winstone Aggregates had decided not to proceed with development of a quarry. It instead participated in a process by which a substantial part of the benefited land was rezoned Industrial 2 and the burdened land was merged with part of the benefited land and then subdivided. He said that Winstone Aggregates "obviously saw more value in selling all the land in parcels rather than as a whole with a view to development of a quarry for which resource consents were held".[135]

[179] NZIPL filed a separate appeal in the Court of Appeal against the High Court Judge's refusal to award compensation. But because the Court of Appeal allowed NZIPL's substantive appeal and declined to modify or extinguish the covenants, it did not consider the issue of compensation.[136]

[180] Mr Galbraith submitted that, if the Court determined that the covenants should be extinguished or modified, then compensation was a live issue in this Court which would need to be resolved. Mr Galbraith said it was of no moment that NZIPL had adduced no evidence to support a claim for compensation. He said that no evidence was adduced because Synlait was not a party to the case in the High Court and it was necessary to know what the outcome would be under s 317(1) before addressing compensation. He said if Synlait had been made to recommence the proceeding in the High Court, NZIPL could have sought discovery of what Synlait had gained from having its factory on the burdened land. He said the appropriate course was to refer the matter back to the High Court.

[181] On the face of it, this Court's leave judgment does not leave open the issue of compensation.[137] And in the absence of any evidence as to the appropriate level of

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134 HC compensation judgment, above n 2, at [6].
135 At [7].
136 CA judgment, above n 3, at [122].
137 SC leave judgment, above n 4.

compensation, we are not in a position to address the issue. Nevertheless, our conclusion that no substantial harm has been done to NZIPL as a result of the modification of the covenants means that there is no basis for an award of compensation or, at best, that any claim for compensation would be minimal. In the circumstances, we do not consider that the proceeding should be prolonged by referring the matter back to the High Court for what would, in effect, be a new claim for compensation by NZIPL. We would therefore have refused to refer the matter back to the High Court.

[182] We do not accept that NZIPL was unable to address compensation at the High Court stage. When NZIPL sought compensation at the substantive High Court hearing, Stonehill objected on the basis it had not been raised by NZIPL in its notice of opposition and there was no evidential basis advanced for an award of compensation.[138] NZIPL was then given an opportunity to file submissions. These could have been supported by affidavit evidence, but were not, despite NZIPL having been alerted to the fact its claim for compensation lacked an evidential foundation.

Costs

[183] The fact that the parties have settled means there are now no live costs issues. But we will set out what we would have done in relation to costs because the same issues are likely to arise in future cases and our approach modifies that which has been adopted in s 317 cases to date.

[184] Although unsuccessful in the High Court, NZIPL argued that Stonehill should pay its costs on a full indemnity basis. It relied on r 14.6(4)(e) of the High Court Rules 2016 (entitlement to indemnity costs under a contract or deed) and cl 7 of sch 3 to both covenants. For convenience we set out the relevant part of cl 7:

> The Covenantor shall pay … the Covenantee's … solicitors' legal costs and disbursements directly or indirectly attributable to the enforcement of this deed and its covenants.

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138 HC judgment, above n 1, at [56].

[185] In his compensation judgment, the High Court Judge considered that cl 7 was engaged because NZIPL's attempted defence of the covenants was "enforcement". NZIPL was therefore entitled to indemnity costs under cl 7.[139]

[186] The Judge quantified the indemnity costs payable by Stonehill to NZIPL in his costs judgment. NZIPL claimed costs of $141,419 plus disbursements of $19,964.91 for the work undertaken by its solicitors in connection with the proceeding. The Judge was satisfied these amounts were reasonable in the circumstances and awarded the costs and disbursements claimed.[140]

[187] The Court of Appeal upheld the High Court decision on costs. It found that in resisting the application for modification or extinguishment of the covenants, NZIPL was, in effect, indirectly seeking to enforce the covenants by preventing them from being modified or extinguished.[141] The Court also awarded indemnity costs to NZIPL for the appeal to that Court.[142]

[188] Three issues arise:

(a) Is resisting an application for modification "enforcement" of the covenants?

(b) If it is, does cl 7 apply even if NZIPL's attempt to resist the modification of the covenants fails?

(c) If the answer to (b) is yes, is there a public policy reason not to award indemnity costs, despite cl 7 of sch 3 to the covenants?

Is resisting an application for modification "enforcement" of the covenants?

[189] Both the High Court and Court of Appeal considered opposing the making of an order under s 317 amounted to "enforcement".

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139 HC compensation judgment, above n 2, at [13].
140 HC costs judgment, above n 2, at [14]–[15].
141 CA judgment, above n 3, at [128].
142 At [135].

[190] Ms Hambleton, who argued this part of the case for Synlait, argued that, when determining whether a person was entitled to indemnity costs under a contract or deed for the purposes of r 14.6(4)(e), the entitlement must be plainly and unambiguously expressed.[143] She said there was a distinction between compelling the observance of a covenant (enforcement) and defending an application under s 317. She said if NZIPL succeeded in defending the s 317 application, it would still need to issue new proceedings to enforce the covenant. The use of the adverb "indirectly" did not change this.

[191] Mr Galbraith said defending a s 317 application was an enforcement step, because it required defending the integrity of the covenants. He accepted that NZIPL had not sought an injunction but said the obvious reason for this was that an interim injunction would have required it to give an undertaking as to damages.

[192] Determining whether cl 7 gives NZIPL an entitlement to indemnity costs in the present situation is a matter of contractual interpretation.[144] Ordinary principles of interpretation apply. In the present case, this turns on what "enforcement" means in the context of cl 7.[145]

[193] There are some similarities between the present situation and that which arises when a lessee applies to the court for relief against forfeiture. In such cases, costs of opposing the application have been found to be incidental to enforcement.[146] There is also some similarity with the position in *The Trustees of the K D Swan Family Trust v Universal College of Learning*, which concerned an application by the lessee for a declaration that the lease was "illegal and void".[147] The lessor counterclaimed seeking a declaration that the lease was valid and binding on the parties. The Court of

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143 Citing *Newfoundworld Site 2 (Hotel) Ltd v Air New Zealand Ltd* [2018] NZCA 261, [2018] NZCCLR 22 at [84], which in turn relies on *Re Adelphi Hotel (Brighton) Ltd* [1953] 1 WLR 955 (Ch) at 961.

144 *Watson & Son Ltd v Active Manuka Honey Assoc* [2009] NZCA 595 at [21]. See also *Petroleum Logistics Ltd v Berry* [2019] NZHC 548 at [24] and [28].

145 We do not consider it is necessary to have a special rule for such clauses requiring unambiguous language.

146 *NJG Holdings Ltd v Oliphant* HC Auckland CIV-2006-404-4749, 18 March 2007 at [14]; *Maydanoz NZ Ltd v Poppelwell* [2012] NZHC 2223 at [13]; and *Patel v Macleod* [2017] NZHC 990 at [33]–[41].

147 *The Trustees of the K D Swan Family Trust v Universal College of Learning* CA255/02, 23 September 2003.

Appeal entered summary judgment on the lessor's counterclaim and made a declaration that the lease was valid and binding.[148] The Court held that the landlord's counterclaim seeking a declaration of validity of the lease was an exercise of enforcing its rights under the lease, and that the landlord was therefore entitled to its costs on a solicitor and client basis, because the lease entitled it to such costs that were "incidental to the enforcement" of the lease.[149]

[194] In the relief against forfeiture situation dealt with above, the background was an attempted enforcement action, which provoked proceedings from the party against whom enforcement action was directed. That is not the case here: although NZIPL wrote to Stonehill demanding that work on the Synlait plant cease, it did not take any action to enforce the covenants. We accept that the requirement to give an undertaking as to damages was a valid reason for NZIPL not to seek an interim injunction. However, it could have sought a permanent injunction, which would not have required an undertaking as to damages.

[195] In the *K D Swan* case, the landlord responded to the application for a declaration that the lease was invalid with a counterclaim for a declaration that the lease was valid. NZIPL took no similar action here.

[196] While there is room for dispute about the nature of the present proceedings, we consider that NZIPL's opposition to the s 317 application was sufficiently analogous to enforcement to bring it within cl 7 of sch 3. While NZIPL did not formally institute proceedings (such as an application for a permanent injunction), its defence of the covenants was a necessary step to bringing enforcement action. We proceed on the basis, therefore, that the Courts below were right to treat the present proceedings as amounting to enforcement.

Does "enforcement" include an unsuccessful attempt at enforcement?

[197] It is notable that, unlike many similar clauses, cl 7 of sch 3 refers to enforcement, but not to "attempted enforcement". The question arises as to whether

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148 At [93].
149 At [94]–[95].

"enforcement" includes attempted enforcement when the intended enforcement action is unsuccessful, as NZIPL's opposition was in the High Court and in this Court.

[198] Authorities in both New Zealand and Australia support Synlait's argument that "enforcement" does not include unsuccessful enforcement in the context of indemnity costs clauses. The New Zealand authority is *Herron v Wallace*. In that case a settlement deed included a provision requiring parties to pay Mr Herron's legal costs on an indemnity basis in enforcing the agreement in the event of its breach by any party. Mr Herron took proceedings in which he was partially successful.[150] Faire J held that Mr Herron was not entitled to indemnity costs in relation to the parts of the claim in respect of which he was unsuccessful, because such steps were not in enforcement of the settlement deed.[151] A similar position has been reached in two New South Wales Supreme Court decisions: *Precious Metals Australia Ltd v Xstrata Windimurra Pty Ltd* [152] and *BB Australia Pty Ltd v Danset Pty Ltd (No 2)*.[153]

[199] We do not consider that enforcement includes an unsuccessful attempt at enforcement, particularly where there is no reference in the indemnity costs clause to the costs of any "attempted enforcement". Were it otherwise, the party entitled to the benefit of the indemnity costs clause would be able to commence proceedings unreasonably, knowing that the costs will have to be borne by the party against whom the proceeding is commenced, no matter the outcome.

Is there a public policy reason not to award indemnity costs?

[200] Even where a party has a contractual entitlement to indemnity costs, the court retains a discretion to deny recovery of indemnity costs on public policy grounds or if the costs claimed are not objectively reasonable.[154] Our conclusion that cl 7 of sch 3 does not extend to an unsuccessful enforcement action makes it unnecessary to address this issue.

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150 See *Herron v Wallace* [2016] NZHC 1129 at [168].

151 *Herron v Wallace* [2016] NZHC 2427 at [38]; and *Herron v Wallace* [2016] NZHC 2869 at sch A, cl 2(b)(v)(B)(1). An appeal was allowed in part (*Wallace v Herron* [2017] NZCA 346) and costs were re-fixed (*Herron v Wallace* [2018] NZHC 2638), but this conclusion was not disturbed.

152 *Precious Metals Australia Ltd v Xstrata Windimurra Pty Ltd* [2005] NSWSC 141 at [47] and [53].

153 *BB Australia Pty Ltd v Danset Pty Ltd (No 2)* [2018] NSWSC 1745 at [42].

154 *Beecher v Mills* [1993] MCLR 19 (CA) at 25; *Watson*, above n 144, at [21]; and *The Official Assignee v Haines House Removals Ltd* [2013] NZCA 480 at [12].

The award of costs in this Court and the Courts below

[201] We now turn to costs in the High Court and Court of Appeal, and then address what award would have been appropriate in this Court.

[202] In her costs judgment in *North Holdings*, Katz J held that the respondent who unsuccessfully opposed an application under s 317 should not be required to pay the costs of the applicant.[155] Her reasoning is encapsulated in this paragraph of her judgment:

> [11] The nature of the proceedings must be kept in mind when considering costs issues. Unlike in ordinary civil litigation, a party who opposes extinguishment or modification of a covenant starts from the position of being "in the right". In opposing the application they are seeking to protect their existing legal rights. For that reason the normal rule that costs follow the event does not apply. A respondent who unsuccessfully opposes an application to extinguish of modify a covenant should generally not have to pay the applicant's costs, unless he or she has acted unreasonably.

[203] Katz J referred to two earlier cases, *C Hunton Ltd v Swire*[156] and a Victorian case, *Re Withers*.[157] The reasoning and outcome in both of those cases was the same as in *North Holdings*. Other New Zealand cases in which no award of costs has been made against an unsuccessful objector to an application under s 317 are *Cambray North Island Ltd v The Minister of Lands*,[158] *Martins Bay Investments Ltd v Askham*,[159] *Re Barfilon Investment Ltd*[160] and *Pollard v Williams*.[161] The position in England and Wales (as reflected in a practice direction of the Upper Tribunal) is the same.[162]

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155 *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 1175 at [12]–[14].

156 *C Hunton Ltd v Swire* [1969] NZLR 232 (SC).

157 *Re Withers* [1970] VR 319 (SC).

158 *Cambray North Island Ltd v The Minister of Lands* HC Auckland CIV-2011-404-513, 14 December 2011 at [12]–[14].

159 *Martins Bay Investments Ltd v Askham* [2017] NZHC 1963, (2017) 18 NZCPR 854 at [35].

160 *Re Barfilon*, above n 108, at [58].

161 *Pollard v Williams*, above n 43, at [51].

162 *Practice Directions: Lands Chamber of the Upper Tribunal* (29 November 2010) at [12.5(3)]; and *Practice Directions: Upper Tribunal (Lands Chamber)* (19 October 2020) at [15.10]. See also *Winter v Traditional & Contemporary Contracts Ltd* [2006] EWCA Civ 1740, [2007] 2 All ER 343 at [21]; and *Thames Valley Holdings Ltd v The National Trust* [2012] EWCA Civ 1019, [2012] 5 Costs LO 630 at [23]–[25].

[204] In Australia, the practice is that the costs of an unsuccessful objector who has acted reasonably should be met by the successful applicant.[163] NZIPL did not suggest that we should adopt Australian practice, but we have considered whether we should do so. On balance, we consider awarding costs to an unsuccessful objector would not be appropriate. It is one thing to protect the objector from an adverse costs award against it, assuming it acts reasonably. But if the objector is also immunised from any cost of defending its covenant, there is no real incentive for it to engage with a proposal to address the applicant's concerns without the need for a court application. We do not think that is desirable.

[205] We do not consider that NZIPL or Mr Ye acted unreasonably in opposing the application made by Stonehill. This was not a clear-cut case and it was reasonable for NZIPL to attempt to maintain the covenants at first instance. In those circumstances, therefore, we conclude that no award of costs should have been made against NZIPL or Mr Ye in the High Court, despite the fact that their opposition to Stonehill's application did not succeed. But no costs award should have been made in their favour either.

[206] *Pollard v Williams* was an appeal to the High Court from a decision of the District Court. When discussing costs, Cooke J distinguished between the position at first instance and on appeal.[164] Having concluded that no award of costs should be made against the unsuccessful objector to the s 317 application in the District Court, Cooke J continued:[165]

> [52] On appeal the position is different, however. Mr Pollard has pursued an appeal, and put the respondents to the cost of defending it. He has done so unsuccessfully. In those circumstances he should be liable for costs to the [applicant] in the usual way.

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163 Brendan Edgeworth *Butt's Land Law* (7th ed, Thomson Reuters, Pyrmont (NSW), 2017) at [10.970]; *Re Rose Bay Bowling and Recreation Club Ltd* (1935) 52 WN (NSW) 77 (SC) at 79; *Re Withers*, above n 157, at 320; *Re Eddowes* [1991] 2 Qd R 381 (SC) at 396–397; *Re Rollwell Australia Pty Ltd* (1999) Q ConvR ¶54-521 (SC) at [23]; *Mamfredas Investment Group Pty Ltd v PropertyIT and Consulting Pty Ltd* [2013] NSWSC 929 at [86]; *Wong v McConville (No 2)* [2014] VSC 282 at [12]–[14]; and *Jiang v Monaygon Pty Ltd* [2017] VSC 655 at [5]–[7].

164 *Pollard v Williams*, above n 43, at [51]–[52].

165 Cooke J stated that this was a preliminary view only and invited the parties to file memoranda. He confirmed this approach in a subsequent costs judgment: *Pollard v Williams* [2019] NZHC 2285.

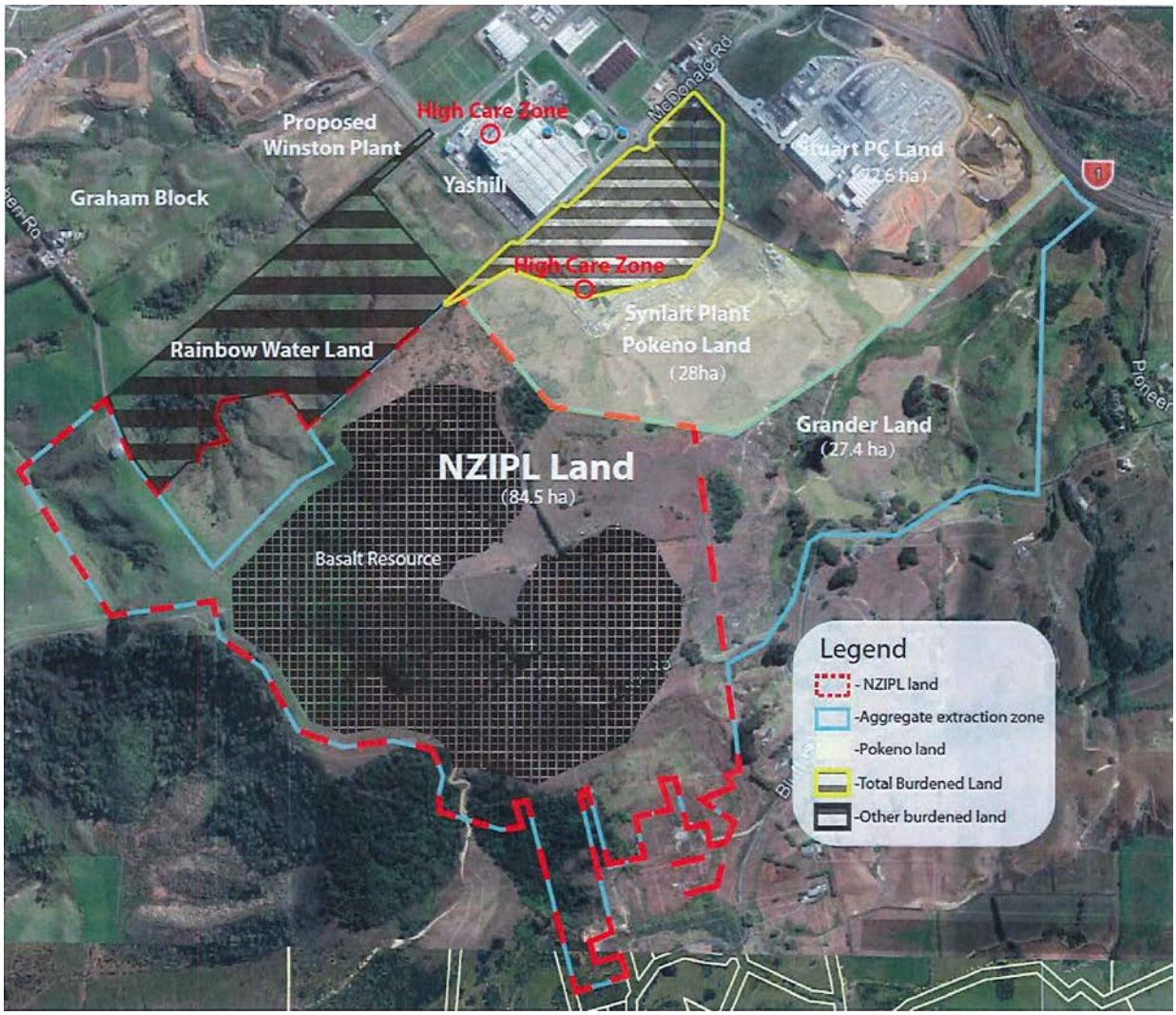
[207] We agree with that sentiment. In our view, normal costs principles should apply on appeal (whether to the High Court, Court of Appeal or this Court) in the absence of any reason to the contrary. We would therefore have awarded costs to Synlait on the normal basis for a hearing of two days' duration with two or more counsel. We would have quashed the costs awards in the Courts below and ordered that no award of costs be made in respect of the proceedings in the High Court and that costs in the Court of Appeal be reassessed in light of this judgment.

Result

[208] For the above reasons, we would have allowed the appeal, modified the covenants insofar as they relate to the burdened land owned by Synlait by deleting cl 1 of sch 3 of both covenants, and made the orders relating to costs as set out above. In light of the settlement, the formal orders are that the appeal is allowed and there is no order as to costs.

Solicitors:
Minter Ellison Rudd Watts, Auckland for Appellant
Buddle Findlay, Auckland for Respondents

Appendix


Proposed
Winston Plant
High Care Zone
Yashili
McDonald Rd
Stuart PC Land
(72.6 ha)
Graham Block
High Care Zone
Synlait Plant
Pokeno Land
(28ha)
Rainbow Water Land
Grander Land
(27.4 ha)
NZIPL Land
(84.5 ha)
Basalt Resource
Legend
- NZIPL land
-Aggregate extraction zone
-Pokeno land
-Total Burdened Land
-Other burdened land