



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

SYNLAIT MILK LTD v NEW ZEALAND INDUSTRIAL PARK LTD

(SC 50/2019) [2020] NZSC 157

PRESS SUMMARY

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

Introduction

The appellant, Synlait Milk Ltd (Synlait), recently built an infant formula factory on land near Pōkeno. The land on which the factory is built is subject to two restrictive covenants which, among other things, restrict use of the land to grazing, farming and forestry. Synlait's plant is therefore in breach of the covenants. The issue on appeal was whether the covenants should be modified under s 317 of the Property Law Act 2007 so that this restriction is removed or the covenants extinguished altogether.

Settlement

After the hearing but before the judgment was delivered, the parties advised that they had settled the dispute. The settlement is now unconditional and a notice of discontinuance has been filed. The Court has nevertheless decided to deliver judgment. The issues raised by the appeal are matters of general importance and the Court's views differ, markedly in some respects, from those of the Court of Appeal. However, the settlement means that the judgment does not determine the respective rights and interests of the parties in relation to the dispute.

Background

Most of the land which benefits from the restrictive covenants is owned by the respondent, New Zealand Industrial Park Ltd (NZIPL). Located within NZIPL's land is a basalt resource. This makes NZIPL's land a potential site for a commercial quarry. The restrictive covenants that burden Synlait's land protect the possibility of quarrying by restricting the use of the land, and preventing the owner of the burdened land from interfering with a quarry on NZIPL's land,

from making a claim for damage or loss arising from a quarry and from seeking to have more stringent regulatory controls applied to a quarry.

Synlait purchased the land in 2018. A condition of the sale of the land to Synlait was that the vendor would obtain removal of the covenants. The vendor applied for modification or extinguishment of the covenants pursuant to s 317 of the Property Law Act. Section 317 of the Property Law Act gives the court a discretion to modify or extinguish a restrictive covenant wholly or in part where one of the specified grounds is made out.

The vendor was successful in the High Court and the covenants were extinguished so far as they affected Synlait's land. The High Court also awarded NZIPL indemnity costs in reliance on a clause which required Synlait to pay NZIPL's costs of "enforcement" of the covenants. However, NZIPL successfully appealed to the Court of Appeal. The Court of Appeal also held that NZIPL was entitled to indemnity costs.

Synlait was substituted for the vendor as applicant in this Court. At the same time, leave to appeal was granted.

The Supreme Court's judgment

The Court considered that three of the grounds for modification in s 317(1) were made out.

First, the Court considered the ground in s 317(1)(d) – that modification would not cause substantial injury – was made out. The Court did not accept NZIPL's submission that the presence of the Synlait factory would make it more difficult obtain resource consent for a quarry and thereby substantially injure NZIPL. There was uncertainty as to whether NZIPL would ever develop a quarry. Obtaining resource consent for a quarry would also be difficult given the encroaching residential development and other dairy factories in close proximity. The presence of the Synlait factory would not make any substantial difference.

Second, the Court held that the ground in s 317(1)(a)(ii) – that the covenant ought to be modified because of a change in the character of the neighbourhood – was established. Parts of the burdened and benefited land have been amalgamated. Synlait's land, and other land surrounding the quarry, is now part of a major industrial park.

Third, the Court considered that the ground in s 317(1)(b) – continuation in force of the covenant 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 covenant was created – was also made out. The changes that have occurred in Pōkeno and the area surrounding the quarry were not reasonably foreseeable when the covenants were entered into.

The Court considered that there was no reason to decline to exercise the discretion in s 317(1) to modify the covenants. The Court would therefore have allowed the appeal and modified the covenants by deleting the clause that limited the use of the burdened land owned by Synlait to lifestyle farming, grazing and forestry.

The Court would also have allowed Synlait's appeal against the Court of Appeal's decision that NZIPL was entitled to indemnity costs. The Court accepted that NZIPL's opposition to the s 317 application amounted to "enforcement". However, the Court considered that the

reference to “enforcement” in the covenants included only successful enforcement. NZIPL was therefore not entitled to indemnity costs.

But given the nature of a s 317 application, the Court considered that no award of costs should have been made against NZIPL in the High Court, even though it was unsuccessful. However, normal costs principles apply on appeal. The Court would therefore have awarded costs to Synlait on the usual basis if the dispute had not been settled.

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