IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 50/2019
[2020] NZSC Trans 15

BETWEEN **SYNLAIT MILK LIMIITED**
Appellant

AND **NEW ZEALAND INDUSTRIAL PARK LIMITED**
First Respondent

YE QING
Second Respondent

Hearing: 3-4 June 2020

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: J G Miles QC, A J Horne and J T Hambleton for the Appellant
A R Galbraith QC and D T Broadmore for the Respondents

CIVIL APPEAL

MR MILES QC:

May it please Your Honours. I appear for the appellant with Ms Hambleton and Mr Horne.

WINKELMANN CJ:

Tēnā koutou.

MR GALBRAITH QC:

If Your Honours please. I appear with David Broadmore for the respondent.

WINKELMANN CJ:

Tēnā korua. Mr Miles?

MR MILES QC:

Your Honour, I thought I might hand up, with your leave, just a three page outline, just tracking where we're going, and annexed to that are a couple of plans which will just make the submissions a little easier to follow.

WINKELMANN CJ:

If they're large they will.

MR MILES QC:

There's nothing new in the outlines Your Honours. It's just simply encapsulating the 30 pages into three pages. It just is a little clearer, I think, to follow the structure of the argument.

The two, well one enlarged photograph I suppose and the other map, Your Honours, the photo I think I produced at the leave hearing, but just as a reminder for those who weren't there, you will see that the area enclosed in the green line is the Synlait land, the 28-odd hectares. The small portion of that, seven or eight hectares, which is governed by the covenants is shown in red, and you can see through the photograph really where the factory is erected. To the right is another quite significant area, I think it's something over 20 hectares, which is owned by Stuart and that is leased to a factory producing pipes, and directly to the north of Synlait, just across the road actually, where that green line runs, is McDonald Road. So literally on the other side of the road is another milk treatment plant, Yashili. That's been erected since 2012. So that's a very similar plant to the Synlait plant. Just to

the west of Yashili is another block, which is described as Yashili stage 2, and that indicates where Yashili is expanding its factory, and you will see that that literally goes to the corner of New Zealand Industrial Park land, which is that large 80-odd hectares to the left. So are Your Honours with me so far?

WINKELMANN CJ:
Is the Yashili stage 2 the part that's divided with a black line?

MR MILES QC:
Yes, it's the dotted white, yes, it's the dotted line Ma'am. Then directly to the north of the extended Yashili development is Winston Nutritional and that's another milk treatment plant. It's yet to be erected but it's got the permits and that's been accepted in the evidence that that will be erected as well. So the significance of this just indicates what the area is like, what the character of the neighbourhood is and just how close Yashili and Winston Nutritional are to NZIP, and we will say during the submissions, of course, that there's no material difference between the positioning of Yashili and Winston and Synlait. They are all, in all material ways, just adjacent to NZIP and any impact that Synlait would have would, of course, have an identical impact to Yashili or Winston.

Now the other map, Your Honours, is just taken from the Waikato District Council but it's helpful because it just indicates what of the immediate areas are now zoned industrial, what are now zoned residential, the total burdened land and also the total of the original benefited land. So if you just take the original benefited land, that's outlined in green. So you see that's towards the bottom of the map. It includes, of course, the NZIPL. It then runs into the Hynds Foundation land.

Now, Your Honours, you may have picked up from reading the judgment and from the evidence a reference to Grander being an owner. Grander has sold to Hynds Foundation and Hynds Foundation is linked with the Hynds factory which is just to the north of that. That's the land owned by Stuart PC.

So you can see that the original land just runs, well, includes the Hynds Foundation, includes the Stuart, includes Synlait, and it runs back to the left down McDonald Road and finishes up down, as you see, in sort of the bottom left-hand corner where it links with NZIPL.

So just for Your Honours' information, that total land, it was roughly, it was somewhere between 140 and 150 hectares. It was all owned by Winstone back in the 1990s and the early 2000s and the intention Winstone had was to use it as a quarry.

ELLEN FRANCE J:
Could I just check, Mr Miles, in terms of the photograph shows the Hynds buildings, where on the other map would that appear roughly?

MR MILES QC:
Stuart PC's. I'm pretty confident I'm right, there's no buildings as yet on the Hynds Foundation.

So back then, Your Honours, you have the 150-odd hectares all zoned for aggregate extraction. The remaining land to the north and to the west and indeed anywhere else in the area was all rural. That was the tiny rural village of Pokeno. The one element in the land surrounded by Winstone was a small area of nine odd hectares which was owned by the Cleavers and they had that little area which, of course, was surrounded by the red line because that's where the covenants were and from Winstone's point of view they were a problem because that was a little lifestyle block and Winstone's was worried that they might be a problem were Winstone's to apply for resource consent to quarry. So effectively they did a deal with the Cleavers.

WINKELMANN CJ:
They allowed the Cleavers to build their house.

MR MILES QC:

Quite, but the trade off was that it would be restricted simply to grazing and lifestyle farming, as it were, which was effectively just grazing, and they would not object to any issues that might arise on a resource consent.

Now what this map is also significant in it shows the rezoning that took place in 2012 where the rural land to the left of McDonald Road now owned by Yashili and Winston Nutritional and Rainbow and the others, that was all rural until 2012 when it was zoned industrial, and you'll see that there are two levels of industrial land. One is light industrial and one is heavy industrial and that is shown in the map where the heavy industrial, which is the purple, is now all the Synlait and Stuart land, and then runs back along McDonald Road. Over the road is light industrial where you have Yashili and Winston Nutritional. Then further to the left you've got the rezoned residential area which is now, which was part of what was planned in 2010/2012 where they intended Pokeno to become a significant little town of up to 5000 and many more in due course. So what this plan I think indicates is really a pictorial reference of the evidence indicating just how dramatically the area changed from 1998 and 2000 when the two covenants were entered into, and today.

Your Honours, there is this issue hanging over this, the application for further evidence, and I'm just not sure how Your Honours wanted to deal with that. I wondered whether one approach might be just to leave it until the close of the submissions when it would become a little clearer as to how cogent and relevant the evidence might be, but obviously I'm in Your Honours' hands on that.

WINKELMANN CJ:

I think we agreed that we'd just take it and then make a determination in the course of reaching our judgment.

MR MILES QC:

Right.

WINKELMANN CJ:
But what would be of assistance is when you are referring to evidence, which is subject to that application, you just flag that.

MR MILES QC:
Yes. For what it's worth Your Honours, like so often, I think, is the case when you apply to call further evidence, it mightn't have quite the same significance as we thought it might when the application was made, and I rather suspect that the respondents might have a similar view, but that will become clearer during the submissions.

Now I think what was also handed up was a further judgment. It's a recent one of Justice Gault. It wasn't, so it will be now Your Honours. It's a judgment that was mentioned peripherally I think in the respondents' submissions, but it is useful because it's a very decent judgment dealing with a couple of the grounds on which we're applying and it also discusses the significance of rezoning and how that might be a relevant change of circumstances. But I'll come to that in due course.

Now just turning to our written submissions, Your Honour, on some appeals it's relatively straightforward where I really, I barely refer to the written submissions because the issues, there might be a couple of issues and they can be discussed in a much more helpful way, just really orally. But the issues here, there are half a dozen or so which need to be traversed and if Your Honours will bear with me I will stay to some extent on script, but conscious, of course, that Your Honours will have had a chance to read the submissions and will be aware of the issues.

WINKELMANN CJ:
You go ahead and do that Mr Miles, we're quite happy with that.

MR MILES QC:
Yes, but Your Honour I know you don't need any reminder of this, but if you get bored with what I'm saying, just tell me to move on. The first page or two

just fulfils its traditional role, particularly paragraph 3 I suppose, where it just sets out the big picture. What Pokeno was like in 1998, what the zoning was, and how the neighbourhood and the use of the land has fundamentally changed over the next 20 years.

One of the points it makes is that the original parties to the covenants have long gone, and that tends to be an element. The other theme, I suppose, running through it, is that the restrictions that were negotiated with the Cleavers were consistent with the zoning. The link between the benefited land, the 150-odd hectares of Winstone and the nine acres of the Cleavers, the link between the two was coherent and understandable, and it fitted with the then zoning. All that was required was that there'd be some restriction on what would otherwise be allowed on a rural property. What has happened over the next 20 years is a complete disconnect between the owners, the size of the relevant parcels of land, and the entire character of the neighbourhood, that is interlinked of course with the fundamental change of zoning that took place in 2012. A change of zoning, I might add, Your Honours, and which I'll probably refer to once or twice again later in the submissions, but it was a change of zoning that had absolutely nothing to do with Synlait or Stonehill, it was a change of zoning supported actually by Winstones, because by that stage, having applied for and obtained a resource consent I think in 2002 to quarry the land, they let it lapse, and that had lapsed in 2009 and then over the next year or so it became clear that they'd abandoned the idea of quarrying the land and were subdividing it and selling it.

Now at paragraph 6 on page 3, Your Honours, I just set out the grounds on which we say the Court of Appeal was wrong, and I think they are probably repeated in the road map that I handed up to Your Honours.

At page 4 at paragraph 10 we talk about the position that the land, really the position that was dealt with by the two covenants. Now there were actually two covenants over two parts of the burdened land, and I'll show you a map that indicates that, because you'll just get a feel of how that was divided up. If you go to volume 304 at 1177, now if Your Honours have that, it's a photo

with the two areas of land covered by the two covenants shown in yellow. So just once again, Your Honours, just to put this in context, you can seer the Hynds factory at the back, you can see Yashili on the left, and you can see how close it is to Synlait's, it's literally just across the road. Yashili will develop the land just in front of it, you can see that big semi-circular area where the vegetation has been removed, that's where Yashili is extending its factory. The red line is the Synlait boundary and the two yellow outlines indicate the two areas of land covered by the two covenants. Nothing hangs on that, Your Honours. There is a slight difference in the two covenants. One I think is a forest –

WINKELMANN CJ:

Allows forestry.

MR MILES QC:

Forestry, yes, and the other doesn't, but again nothing hangs on that.

O'REGAN J:

So which is which is that photo? Which is 1998 and which is 2000?

MR MILES QC:

I don't know, Sir?

O'REGAN J:

Nothing hangs on it?

MR MILES QC:

Nothing hangs on it, Sir, but what it does show though is you will see that the burdened, or rather the covenants cross over the northern boundary into the Hynds or the Stuart land. So you'll see how that, the apex as it were of that triangle, crosses the boundary so that it's not just Synlait that is actually a burdened owner, it's also Stuart. The relevance of that, well, it's just part of the disconnect now between a coherent system back in 2000 and, we say, a totally incoherent system now, and actually if you go down to the…

WINKELMANN CJ:

So Stuart is a burdened piece of land but it has a pipe factory on it?

MR MILES QC:

Quite. Exactly.

WINKELMANN CJ:

So is the pipe factory a breach of the burdened?

MR MILES QC:

No, because it's not on the burdened.

WINKELMANN CJ:

Okay, right.

MR MILES QC:

Stuart is both burdened and a benefit.

WINKELMANN CJ:

As is the Synlait land?

MR MILES QC:

As is Synlait, quite, and actually ironically, and again I just mention this, Your Honours, it's not going to play any part in your deliberations, but if you go down to the bottom to the sort of south-west, as it were, where the yellow covenant meets the boundary, just further back from Yashili, what this doesn't show is that the covenant in fact extends down the boundary to just out of the photo, now, until it finally hits NZIP and actually there's a tiny bit of NZIP land which is actually burdened. Again, it will play no part in Your Honours' judgment other than it's just a fourth owner now of the burdened land rather than the straightforward structure that it was in 2000. If Your Honours still have that bundle or that volume, if you go to 304.1142 you'll get a photo once again of the neighbourhood. It shows the Synlait building under way, so it would have been sometime in 2018. That's Yashili dominating the middle

ground. Behind Yashili is yet another development and the Hynds you can't see from this, but it just is a graphic example once again of just how close these factories are and just how the environment has changed.

Now coming back to paragraph 10, I can take you to the covenants, Your Honours, if need be. Basically you will find there's a schedule with about six or seven paragraphs. It might be helpful to just take you to it. It's at 301. It's volume 301, page 301. That's the 1998 covenant and if you go to page 306 you'll set out the schedule which is the relevant schedule, and it's eight paragraphs, and the only paragraph we're concerned with is the first one, "The covenantor shall ensure that at all times the Cleaver land is used only for the purpose of grazing or lifestyle farming, which may include the erection or implement sheds," et cetera, and it won't interfere with the quarry land. At 3, "The covenantor will allow the covenantee to carry on the activities of quarrying without interference or restraint," we have no problem with that. The covenantor won't sue or make any claim as a result of any activities on the quarry, and at 6, "The covenantor shall not," when faced with a resource consent application by Winstone, it won't object, it won't make any submission, it won't have any response to any application dealing with, "Noise, dust, vibration standards or any other environmental issues." So again we have difficulty with that at all, it's just that first paragraph that we're concerned with.

O'REGAN J:
So are you still seeking the removal of the covenant or are you just asking for it to be modified to delete paragraph 1?

MR MILES QC:
I think it's complicated a little because we've given an undertaking which is actually slightly more extensive than these paragraphs. So a way to get around some of the rather technical objections by the respondent would be to simply modify these paragraphs, deleting 1, and then, if Your Honours thought it appropriate, to add to the restraints the further undertaking that Synlait has given that not only will it comply with these requirements but in fact it will

support an appropriate application for resource consent. So that could be added without difficulty to this schedule.

O'REGAN J:
So is that what you're seeking now or are you still seeking the removal?

MR MILES QC:
I suppose the best result from us would simply be to delete 1, and then the undertaking is binding on us as we've given that undertaking.

O'REGAN J:
But it's not a restrictive covenant on the title.

MR MILES QC:
Quite. So I could understand a small trade-off, if you like, deleting 1 to adding the further undertaking. But the best result for Synlait and, in a sense though, you know, the cleanest, would simply be deleting 1.

Now just briefly taking you back to paragraph 10, Your Honours, because there we've just set out really what the position was at the time. So we've got 140, it's somewhere between 140 and 150 hectares of benefited land, all owned by Winstone, subject zoned aggregate extraction, with quarrying as a restricted discretionary activity, burdened land owned by the Cleavers, it's surrounded by rural land, a very tiny population.

Now the changes, and there are really a number of strands to our argument that the changes that have taken place justify a successful application under 371(a) or (b), but the first grouping if you like is the fact that there have been these changes in the ownership. I can just say in the broadest terms, Your Honours, that the benefited land, the old 140 hectares, that now has four owners. It's NZIP, it's Synlait, it's Stuart and it's the Hynds Foundation, and similarly the burdened land, what was about 9.2 I think, 9.7 originally, that's now been reduced to about 7.2 and even that tiny area now has three owners I think. Synlait, Stuart in the north and that tiny bit of land with NZIP, and also

something close to a hectare was removed to form McDonald Road. So again there's been quite significant chopping and changing of the ownership of both burdened and dominant land.

ELLEN FRANCE J:
Three owners? Who are the three owners of the 7.2?

MR MILES QC:
Synlait, sorry, the burdened land, that's Synlait and Stuart, that little triangle to the top, and that tiny little bit of land down at the bottom which actually merges into NZIP land. So technically there are three owners and part of the land got taken for the, for roading purposes.

Now Synlait signed an agreement to buy the land in February 2018. Got a resource consent quickly. Was non-notifiable. They needed the consent because there were two or three minor issues. Marginally over the height restrictions and a minor parking issue and one of two of those standard sorts of issues that crop up, but that was all done in accordance with the zoning, and they settled later in the year. The agreement with Stonehill was that Stonehill would apply to have their covenants set aside, which is why Stonehill carried the litigation up until the Court of Appeal.

What is of some significance, Your Honour, is that at the same time NZIP bought their 80 hectares. The original agreement I think was in February. There's a chronology which Your Honours will have. The chronology records the dates that each party bought the land. Synlait obtained its first resource consent on the 19th of March, and it commenced preparatory earthworks at the same time. Then on the 2nd of May Mr Ye entered into an agreement to buy the land and he was well aware of what was going on because a month later, on the 19th of June, his solicitors wrote to Stonehill's solicitors demanding that Stonehill ceases construction. So Stonehill got advice that it could apply to have the covenants set aside, and those proceedings were issued on 25th of May. That letter, of course, from Buddle Findlay was in response to that application. What that letter said, Your Honours, and you

might go to it at some stage, it made two separate demands. It said firstly cease, and we reserve the right, we may issue proceedings, presumably seeking an injunction and damages, and in any event, and as a quite separate response, we will oppose the application.

Now Mr Ye and NZIP completed the purchase of the land on the 1st of October that year. The hearing was on the 28th of October. So throughout the period where Mr Ye signed the agreement and completed the settlement, he was well aware what was going on and indeed was opposing, of course, the application.

Now returning to my submissions, so we've dealt with the change and the ownership of the two groups of properties as it were. Then under (c) on page 6, the start of the significant change from this rural idyll to the commercial hub that it subsequently became was 2007 when Pokeno was identified as an area of growth. There was a structure plan picked up by the District Council and the idea was to expand it from a village in their terms to an urban village, do you see, with a population of about 5000 and 80 hectares of industrial land, and the zoning was changed in due course in 2012. Then at 7 I set out, of course, what has inevitably happened is that the relevant factories have been built on the very land that the Council said should be built.

At page 7, paragraph (f), we just note that further residential development is also planned. NZIPL has in fact applied to rezone its land residential, but with an underlying reservation that it might be permitted to quarry. But it's important to keep in mind, Your Honours, that they have no right to do that at this stage. You need a resource consent and any application for resource consent will inevitably take into account the change in the neighbourhood, the change in the environment and the new factories. Nothing to do with Synlait, simply the other factories that have been built.

Now if we can return to the section itself which I start at page 9 and where we understand that the section is, and then over the next two or three pages we

talk about the history of that section. Now Your Honours I'm sure have got that squarely in mind now and I don't need to spend too much time on it but the important point, I think, is that from 1952 through to 2018 there was a steady extension by Parliament expanding the grounds on which you can apply to set covenants aside or to modify them, a clear and very specific series of decisions by Parliament to make it easier to modify covenants in the event that circumstances have changed resulting in the final two additions, 317(e) and (f) which came into power, as it were, the day before I think Justice Woolford gave his judgment. That actually passed into the law earlier that year but the time for those enactments to kick in was, I think, the 17th or 18th of November, and those two further grounds, if it's against public policy, or the final one, if it's just inequitable to do, which we say is, it's pretty much expanded the grounds to include really anything that seems fair and appropriate.

Unfortunately it appears that the advisers for Stonehill were unaware of those amendments, were not pleaded or referred to in the High Court hearing. In the Court of Appeal hearing we were advised, I think my friend told the Court on the leave application that Mr Broadmore, counsel for the respondent, advises the Court of Appeal, on the morning of the hearing, of (e) and (f). There's no hint in the judgment that the Court took the slightest, paid the slightest attention to (e) and (f). Indeed there's that odd paragraph tucked away in the judgment where they set out 317, and they either, and I just don't have it in front of me at the moment Your Honours, they actually have either (e) or (f), I've forgotten which one, they don't include the other, you know, as a series of dots, and it's just enigmatic. But what is significant is that a fundamental attack, I suppose, we have on the judgment is that far from recognising this gradual freeing up of all the grounds to apply, the judgment was to say it was conservative I think is an understatement. It applied a particularly high and inappropriate standard and it included in the key paragraphs from about paragraph 70 through to about 115, it pretty much included every add-on, every additional factor that the Courts have added over the last 40 years, restricting the grounds on which Parliament said you would apply, and I'll take Your Honours to those rulings, if you like, or

acceptances by the Court that these principles are relevant. There must be half a dozen of them I'll be taking you through where I say they are not part of section 317. They have been added by a number of judgments inappropriately because ultimately you simply look at the section. You recognise that Parliament has accepted that contracts that have been registered can be varied, so long as the circumstances are appropriate. And of course ultimately there's a discretionary element and what I think you'll find, Your Honours, I don't think we can find a case where a Court has said, yes, grounds have been established, and we will exercise our discretion against the applicant. There's not a lot of discussion about discretion, by the way, but the, we will be saying in due course that once we've established the grounds then a Court would exercise the discretion to favour the applicant subject to significant disentitling behaviour. Now that's the approach we take at paragraphs 26 and –

WINKELMANN CJ:
And as to that substantially disentitling behaviour, you say buying the land with knowledge of the covenants is not disentitling behaviour, so it's irrelevant in your submission?

MR MILES QC:
Not in the slightest Your Honour. You're quite entitled to do that and still up to you of course to persuade the Court that the covenant should be modified.

Now at the top of page 11 we just note that the reference in the judgment to the Courts shouldn't exercise discretion unless for very strong reasons. I need to take you to that part of the judgment Your Honours. It's volume 1 at tab 27. You'll find it at paragraph 74 or the start of 73 really, where Their Honours say, "This Court has observed that the courts have traditionally taken a conservative approach towards the exercise of the discretion. The Court stated," that's in a 2017 Court of Appeal judgment, "that there is good reason for this. Applications to modify or extinguish… generally impact adversely on existing property interests. While there has been a progressive broadening of the statutory power… and a commensurate relaxation… the Act

still cannot be used to free a servient tenement owner from an easement (or covenant) simply to improve the enjoyment or 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."

Now I'll get on to 74 in a moment but just to comment on that paragraph, this proposition that this section can't be used by an applicant simply to make life more enjoyable is constantly put up as a criticism against applicants and a reason why the application should fail. I cannot find a case, Your Honours, where an applicant has put forward that as a reason and, of course, they haven't because it's not a reason. It has never been a reason. It's certainly not a reason that has ever been advanced by Synlait. It is, of course, a standard mantra from respondents who say, well, of course, the application, while being wrapped up under one of the grounds in (a) or (b), is effectively just an application to make life more enjoyable or to increase the value of the property, but it has never been used as a reason itself. Of course, no applicant applies unless they believe there will be some advantage. I mean why would you? But that's a consequence of satisfying a Court that the circumstances have changed sufficiently.

Then that sentence about sweeping aside property rights in the absence of strong reasons. A bit of rhetoric has built about this issue of property rights. It's just it's a contract. It was a contract entered into by two parties which had the characteristic of that agreement that it could be registered on the title and hence bound subsequent purchasers. Other than that, it's just a private contract and Parliament has made it clear for the last 60 years that so long as the circumstances are appropriate they will be modified. Nothing gets swept aside and you certainly don't need strong reasons. You need to comply with the requirements of the section.

But it gets more conservative in the next paragraph. "Similar sentiments have been expressed in the High Court," and by the way His Honour concludes this paragraph over the page. "We agree with the general approach discussed in

both those cases." So these cases have not been referred to lightly. They are taken as establishing appropriate principles.

So he starts with *Luxon v Hockey* (2004) 5 NZCPR 125 (HC), takes into account sanctity of contract and the appropriation of property rights. Well, I've already commented on that. And then *AFFCO New Zealand Ltd v ANZCO Foods Waitara Ltd & Ors* HC Wellington CIV-2004-485-499, 23 August 2004, a judgment of Justice Ronald Young given in 2004, before, of course, that further amendment took place permitting compensation in 2008 when the 317 was modified to add that.

So what Their Honours say, there's the three guiding principles, the first repeating the point made in the earlier paragraph. You can't get a benefit just for freeing up the restrictions because it makes life more enjoyable. Of course you can't. It's never been a ground. So, one, I say you simply don't – that's an irrelevance when assessing whether 317 has been applied before. Secondly, the length of time between the imposition of the covenant and the application is relevant. Well, why? The section doesn't say so. If there's been a change of circumstances in a year the Act will apply. If it wasn't foreseeable at the time that the covenant was entered into then 317(b) is triggered and so on. I can understand that a Judge might be more sceptical about whether a change has taken place or whether it might be foreseeable or not but on itself, once again, irrelevant.

WINKELMANN CJ:
You would say it's relevant to the fact-finding task as to whether it was reasonably foreseeable.

MR MILES QC:
Yes, Ma'am. Of course the first ground, it doesn't have to be foreseeable, it's only the second. But yes, of course. And obviously it would be unusual if in the first six months something, it was so fundamental you couldn't foresee it, but in *North Holdings Development Limited v WGB Investments Limited* [2014] NZHC 670, a judgment which is a very helpful judgment, a High Court

judgment of Justice Katz, where there was a change of zoning, the change of zoning was, the original zoning was determined by the developer, and incidentally what he wanted was a subdivision with high-class commercial development, it was up in Whangarei somewhere. The development failed, there were a couple of the lots sold, but basically it stalled. Five or six years later the owner, the developer, decided, well, the probable reason is that it's just difficult, "It's not economical to produce the high-class buildings we want," so sought a change of zoning to enable a slightly lesser quality building. And of course the owners who'd bought it in the first place objected because they could see a possible diminishing value. And Justice Katz said, "Change of zoning, clear change of use, wasn't foreseeable at the time," so found in favour of the applicant on both grounds. But that was a case of five or six years after and also, by the way, a case of the original covenantor applying to have the covenants modified. So it's far and away the most, the case that is probably closest on the facts and on the law to the one we're dealing with today.

ELLEN FRANCE J:

If you're thinking about something like change in neighbourhood, why isn't length of time relevant there?

MR MILES QC:

Oh, it would be, Ma'am. But that's just, I suppose, an adjunct of the change of neighbourhood.

ELLEN FRANCE J:

Well, I'm not sure then that you can say length of time – as you seem to saying – length of time is not a factor.

MR MILES QC:

On it's own is what I was really…

WINKELMANN CJ:

Is your point that it's not a freestanding consideration –

MR MILES QC:

That's…

WINKELMANN CJ:

– it's simply an issue which may or may not be relevant to any particular…

MR MILES QC:

Quite, Ma'am, yes. Of course, I mean I'm totally with Your Honour that a change of neighbourhood is a gradual, often incremental, although it can change quite quickly when there's a change of zoning. The change took, but you know there was a change of zoning in 2012, immediately Yashili built the first the factory and so, you know, the character began to change quite quickly, that was the point I was trying to make.

The third principle, the Court shouldn't exercise its discretion of contractual obligations undertaken in the recent past from being swept aside unless it has shown very strong grounds, so "strong grounds" in the previous paragraph have now morphed into "very strong ground", and there's just no legitimate basis, Your Honours, for that ruling. They do go on to say, "We agree with the general approach although we note that both were decided before the jurisdiction to avoid reasonable compensation." And of course that's right, and there's a judgment which I think we refer to just in the next couple of pages, a first-instance judgment of Justice Randerson in 2010, which is a helpful judgment because that was post the amendment adding compensation and His Honour pointed out that that has now added a significant element to whether the application should succeed or not. So that approach at 73 and 74 then permeates through the rest of the judgment.

Now at 29 I just, because I refer to a recent judgment of Justice Cooke in the High Court, this is Justice Francis Cooke, and it's a helpful judgment, Your Honour, because it encapsulates the points that we were making when we were originally considering an appeal. What I suppose I'm really saying is we happen to adopt, if you like, the points that His Honour made in a subsequent judgment which we hadn't read at that stage. But in a very

elegant and, we say, helpful way His Honour sets out what should be the approach today following all of those changes. We find that in – this is *Pollard v Williams* [2019] NZHC 2029 – Your Honours just have one volume of…

WINKELMANN CJ:
You have your volume and then we have your key volume of authorities.

MR MILES QC:
Yes. It's tab 16 anyway.

WINKELMANN CJ:
Of the full one or the – is it that in the key bundle? We have your key bundle of authorities and your large bundle of authorities.

MR MILES QC:
Oh. It's the larger bundle.

WINKELMANN CJ:
Okay, tab 16.

MR MILES QC:
Well, if we go to 16, Ma'am, it's a judgment just given in August last year, it was an appeal from the District Court. The relevant parts of the judgment start at paragraph 16 and 17, and at 17 he makes the point, "A power to award compensation is now included," moreover the grounds have been modified or have been significantly expanded, you've got (e) and (f). "This seems to me to reduce the significant of the dicta," that's the dicta in *Okey v Kingsbeer* [2017] NZCA 625, (2017) 19 NZCPR 25, again quite a conservative judgment in the Court of Appeal in 2017. He says at 18, "Section 317 involves a balancing of policy considerations. It recognises the important 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 can be removed or relaxed. The balance struct by the section overall has changed in significant but not necessarily profound ways," by the amendments they've undertaken. He says at 19, "In the end, however, it is necessary to address the specific provision and the particular grounds contemplated in the facts of specific cases. General statements about the provision can only be taken so far. The appropriate function of the Court is to identify whether any of the grounds set out are established," and so on. And then a few lines further down, "One of the pre-requisites in 317 must still be established. But it does not create an additional rule that an application cannot be granted when this is the effect of granting it. All applicants to vary an easement or a covenant are no doubt seeking to improve the enjoyment," and so on. And then three lines up from the bottom, "But it is the precise statutory grounds that are relevant, particularly given the Court can now award compensation. Overall, it is necessary to focus on the particular ground."

And that, if as I understand the theme and the view that is really underlying those comments by His Honour, is that so many of the so-called principles that the Courts have adopted in the past, almost always to restrict the statutory rights, are really no longer relevant. Incidentally, that's one of the very, very rare occasions where some compensation was awarded in the District Court, 15,000, although His Honour, you know, in a polite way was somewhat bemused as to how that might have been assessed, but that's by the by.

Now at page 12 we actually start on our argument as to why 317(1)(a) should have been complied with. Now we sum that up at 33, "There have been significant changes in the use of both the benefited and burdened land and further changes are anticipated…significant change in the character of the neighbourhood."

And just while I'm still on page 12 you'll see there are two footnotes, 81 and – say, 81 and 82. At 81 we list a series of propositions the Court of Appeal took into account and we give you the paragraph numbers, and we say that each

of those are inappropriate, that they're not justified by the section and that this Court should clarify whether those issues are indeed relevant or whether, given the way the legislation has gone, whether they should no longer be considered to be relevant to any application.

And at 82, there's a series there of factors that they declined to take into account which we say they should. I'm sorry about the small print, Your Honours, but if you can see that you'll see that it includes, on the second line, future use of the land, and we say there's no reason at all you can't take into account future use so long as the evidence supports the fact that that is likely is to happen and may be relevant, but there's a flat denial of that in the judgment.

The second point is the existence of land in close proximity which is not subject to the covenants, and again I'm going to take you Your Honours to that because that's an important factor which we say is very relevant to pretty much each of the bases of our application. That's the industrial land surrounding ours, Your Honour, and the new plants that have been built, very relevant, but not according to the Court of Appeal, and the change of zoning, that's the last point, where the Court is dismissive about the impact of change of zoning, and each of those, Your Honour, to some extent I'll be discussing in a little more detail further on in the submissions.

Those two footnotes sum up what they took into account which we say they shouldn't have and factors that they didn't take into account which they should have.

WINKELMANN CJ:
Well, it could be said against you on this that these are just facts which go to particular criteria. So they're not pre-standing considerations on their own. They're something – yes.

MR MILES QC:

Quite. Exactly, Your Honour. Then over the page, three further reasons why the applicant should have succeeded. Other relevant significant changes as required by (iii) and then, four, these have altered the benefits or disadvantages significantly, and finally that they considered factors or criteria that were irrelevant and that's really what I refer to in the previous footnote.

So under (a)(1) what changes of use have taken place, and fundamentally, we say here, Your Honours, that there have been significant changes to the use of both the benefited and the servient land.

Now the first point, of course, is the change of ownership of each of them and I don't need to run through that again, and…

WINKELMANN CJ:

Does that amount to a change in use?

MR MILES QC:

Well, yes, it does because the benefited land, which was the Winstone land, of course had 150 hectares of use, and they only have 85 now. In some circumstances that mightn't be relevant, but Justice Woolford in his judgment, if Your Honours would just – I think it's paragraph 15, where His Honour said what Winstone's planned to do was to extract rock from the basalt, from the area of that land where the basalt is, but they were also using the remainder of the land as part of the processing. So it's not just, the significance of land isn't just that part of it has the rock. Winstone was planning to use all of the land. Now there's only half of it roughly, 55%, I think, of that land is now owned by NZIP. So the use while still so long as they get resource consent, it is still possible to get consent for a quarry, but it will be a much smaller quarry because the amount of land left is only half what there was before.

Now the burdened land, same issue about differing owners and so on, but the really significant point is that grazing is now a non-complying activity under the zoning. The irony is that the one activity which the owner of those seven or

eight hectares is entitled to operate, grazing or lifestyle farming is not permitted under the zoning.

WINKELMANN CJ:
And it's said against you that you've got disentitling conduct here because you could have grazed without the need for consent because of continuing use if there hadn't been a…

MR MILES QC:
Well it's, yes.

WINKELMANN CJ:
Cessation of grazing.

MR MILES QC:
Yes, there are two points I think Your Honour. They say, well, if you'd continue to have a few cows there, that's an ongoing right, if you like, which was reserved to you and you could continue to do it, even though the zoning was industrial, and that's right. It makes no sense to, of course, use very expensive industrial land to graze a few cows, but technically we could have done so. Now because Synlait bought the industrial land with the intention of using it, as the zoning wanted it to be used, and as the District Council had said should be used, of course it stopped grazing cows, and once you stop the use for two years, you then have to apply for a resource consent. It's entirely academic because that's –

WILLIAM YOUNG J:
Well it's not a sensible use of the land.

MR MILES QC:
Quite.

WINKELMANN CJ:
But that might be, come in under the reasonable use part, I'm just thinking.

MR MILES QC:

Yes. The use of the land, Your Honour, my sense is that such are the grounds that we're applying for, such are the facts that we're utilising, they probably would justify a decision in our favour under each of the grounds that we have sought. So they do overlap.

ELLEN FRANCE J:

Mr Miles, do you agree that the issue there is whether the same disadvantage applies? So it's not just any change in zoning that will necessarily bring you within one of the grounds, and as I understand it the respondents would say you look at whether the same disadvantages apply. I'm just trying to understand what do you say the test is in terms of zoning changes?

MR MILES QC:

Yes, well we would say that the zoning change probably necessary, well necessary has a result of a different use of the land.

WILLIAM YOUNG J:

Different rates charged I guess.

MR MILES QC:

Mmm.

WINKELMANN CJ:

Well doesn't it have the effect of a different reasonable use of the land?

MR MILES QC:

Quite. That's under (b).

WINKELMANN CJ:

Yes, but under this how do you say well we're dealing with (a) still?

MR MILES QC:

Yes, we're still dealing with (a), but I mean it is a classic, it comes, in arguably it comes under (b) because reasonable use of the land must be what is now

zoned for. But it also has an impact at this stage because we cannot use the land now in accordance with the covenant, so the burden –

ELLEN FRANCE J:

Well I suppose I'm trying to test that because that's not quite true is it? It's just that you would have to get a resource consent to do so.

WILLIAM YOUNG J:

It wouldn't be economic is part of the argument.

ELLEN FRANCE J:

Well…

WILLIAM YOUNG J:

It was once a sensible use of the land, presumably now it's not because for instance it's far more expensive to retain the land.

MR MILES QC:

Yes, quite.

WILLIAM YOUNG J:

It would be uneconomic to, presumably, I don't know, but I assume it's likely to be uneconomic to run cows on.

MR MILES QC:

Particularly as it's only seven hectares.

WINKELMANN CJ:

I mean it seems to be a bad fit into this one. I think it's better fit under (a)(ii) too if you're under this heading, than under – because zoning et cetera goes to the nature of the neighbourhood.

MR MILES QC:

Sorry Your Honour?

WINKELMANN CJ:

It goes to the character of the neighbourhood –

MR MILES QC:

Yes it does, it goes to character, of course it does, yes I agree with that. But at this stage I'm just concentrating on the first ground –

WINKELMANN CJ:

Yes, the use being made of the benefited land or the burdened land or both. It's not really focused on zoning, is it, it's what's been done there.

MR MILES QC:

It's, we have the privilege in this case of saying, I think almost, it seems almost inarguable to me we must come under (b), another reasonable use of land as a consequence of the change of zoning. But we still hit (a) because you have to show that there's been some material change to the advantages or disadvantages to one or other, the burdened or the dominant. The burdened we say is that we have acted rationally and in accordance with the zoning, and we've stopped grazing a few cows, and as a consequence we no longer can comply. Of course that was a deliberate decision, but it was one that was lawful, well we weren't breaching any covenant by not running the cows. We simply recognised that that was a crazy use of the land. So they are burdened now more than they were. The other factor under burdened, of course, is that it's now very much more expensive land, and not to be allowed to use that is a very different factor than not being allowed to use your rural land for particular purposes.

But it also impacts on the NZIP land because, and again I'm, bound to say this does tend to morph into the neighbourhood argument and the reasonable use of the land, but you look at the impact that the covenants have now on the use of the land, and a fundamental argument running through our submissions is that the covenants no longer fulfil the role that they originally did. Perfectly straightforward back in 2000, but now they have become largely irrelevant because of exactly the same problems that NZIP would have had

with Synlait, they now have with Yashili and Winston Nutritional, not to mention all the residential land. So the change in immediate neighbourhood has effectively reduced the significance of the covenants and hence the use of the land.

Now we just make the same point just briefly over the page in the change of neighbourhood, and I've already obviously discussed each of those issues. Under (a)(iii) other relevant changes, really they're much the same Your Honours. The other relevant changes have been used in other judgments in circumstances where the neighbourhood hasn't changed, for instance. In *North Holdings* Justice Katz said well actually the neighbourhood hasn't changed. The development is what it is and it hasn't succeeded, but nevertheless zoning, et cetera, will also come under other circumstances. But if you're with me on all of the other elements, then they would simply be reflected in the same ground.

At page 16 and onwards we set out in greater detail the points that I've already touched on and these are the benefits or lack of benefits, and under 39(a) where we just explain why the covenants are no longer of any practical benefit, first point, quarry's much smaller, and then under (c)(i), (ii) and (iii), et cetera, this is the proposition I've already discussed with Your Honours that the covenant would only work if they'd bound Yashili and Winston and the others which, of course, are outside that area. So at a very significant level they no longer function in the way they were intended.

WINKELMANN CJ:
Now there is a suggestion in the evidence which is picked up by the respondents that there is this notion that they are entitled to take the benefit of keeping this land free of any activity which creates particulates in the receiving environment.

MR MILES QC:
Yes.

WINKELMANN CJ:

So the notion that it's a cumulative impact.

MR MILES QC:

That's given some emphasis in the new evidence. There is a hint in the – because the same experts filed further affidavits under the leave application. What the respondents have done, Your Honours, essentially is this. They recognise that the undertaking that Synlait gave has really made it very difficult to explain how the covenants are still necessary. After all, if Synlait has said – sorry, I'll go back one. The whole point of the covenants, of course, was to stop the owner of those seven hectares from objecting to quarrying. Synlait has said not only will we not object, we will actually support you within reasonable grounds, but crucially we're not going to object. We have no concerns about any dust, particulates, noise, you know, whatever else that might result from your quarry because the factory has been designed at such a high level of specification that it's protected against all of that. So given the undertaking obviously the respondents were concerned that the whole point of the covenants had disappeared.

So the new evidence was really centred on this further highly speculative proposition which I think goes something like this. Each of the infant milk factories have obtained consents to emit a certain quantity of particulates. The evidence of Matthews in his last affidavit says, "Well, actually I was advising I think those companies," and he sets out what the percentages were, you know, one point something per something, and each of those factories have got a permit. He says, well, there might be an issue that the cumulative effect of those three licences creates a cap which would restrict any further applicant.

Now there are two or three fundamental problems with this evidence. Firstly, there is genuine doubt about whether Mr Ye has any intention of turning this into a quarry. That's your starting point, and if you go to the three affidavits that Mr Ye has filed he said on the first, "I have not obtained expert advice at this stage on the economic viability of the quarry but I am interested

in doing so." The second affidavit said much the same, still not obtained that assistance, and in the third affidavit, in part of the leave application, Mr Ye says, "Well, actually all of that's been put on hold pending my application to turn all the land into housing." So he on his affidavit, while he continues to say, "I am interested and it's one of the possibilities," but he has yet to actually, gone through the first step of determining whether there's the slightest economic sense in doing so, that's your first step. The second is that there is no application for a resource consent to quarry. Now each of the experts, the cross-examination of our two experts and Mr Harrison's evidence, ultimately they all came down with the proposition, "We really can't say what effect any of these issues are going to have because we haven't seen an application, there's no basis on which we can give any evidence on what is the likely scope of the application and how difficult it might be to actually obtain it." So you'd have thought that would be enough to say that evidence is so speculative that it can really be dismissed.

WINKELMANN CJ:
Well, Mr Comer said it was all very hypothetical.

MR MILES QC:
Quite.

WINKELMANN CJ:
And I thought the import of his evidence was that the more significant factor was that there are all these considerations in the neighbourhood.

MR MILES QC:
Exactly, it's a factor.

WINKELMANN CJ:
Mr Ye also said that he wouldn't have minded if it was a car factory.

MR MILES QC:
I missed that.

WINKELMANN CJ:

But the point was the sensitivity on the site of a milk factory, that that would likely impact on his ability to get consent for the quarry.

MR MILES QC:

Yes, but what the evidence at the hearing concentrated on was just Synlait. I don't think you'll find when you read the evidence of the experts called by the respondent, at least the first lot of evidence that was before the Court, I don't think if you read that you'll find any reference to Yashili, Winston, et cetera. They were simply saying if a milk treatment factory was built next-door to a quarry it will inevitably have an impact. What they didn't tell us is how that would be different to the identical impact that the other factories would have and who would object for the same reasons. But there is actually a third factor which to me seems to be the final straw in saying the new evidence is so speculative that you can legitimately dismiss it. What Mr Harrison – sorry, what Mr Matthews says, "Well, you've got these three licences and inevitably the quarry will actually emit certain particles as well, so there may be a cap and this may be an issue." He doesn't tell us whether there is a cap, he doesn't tell us what the cap, even if it existed, what the cap might be so we could make some broad assessment as to whether the three licences that had already been issued gets anywhere near the cap, and the next point is he doesn't explain what level of particulates the quarry might emit and of course he can't because no one knows, there's no application. So to call it speculative is an understatement. No evidence of any such cap, no evidence of what might be emitted, it's purely speculative, and it's framed in that way to do the best they can to avoid the impact of the undertakings.

WINKELMANN CJ:

I suppose you could say that the benefit is different, to stop Synlait emitting is quite a different thing to stopping Synlait objecting.

MR MILES QC:

Yes, quite. And by the way, Your Honours, and just in case I overlook it, tucked away in the respondents' submissions, and Mr Ye's evidence I think is,

"I've also got support," he says, "from a couple of other covenants, from other neighbours, which also restrict activities and which assist me in my quarry," and he indicates, he refers to those two covenants, one in 2007 and one in 2012, and they are neighbours. They are a little further away. They don't ring NZIP's land as such, but they're just one layer back. What is significant about those covenants is that they are identical to the two covenants we're talking about except clause 1. They don't have a restriction on building a factory or whatever. They're non-object clauses. So they have the remaining clause, which we're happy with, but not the unduly restrictive one, and what we would suggest is that as the neighbourhood has changed, so you've got 2007 and 2012, it became increasingly apparent that it was pointless stopping, negotiating covenants stopping owners from building on industrial land. The most that anybody could reasonably expect is that they won't object. So those two covenants I'll …

ELLEN FRANCE J:

Mr Miles, just going back to Mr Matthews evidence, there is some cap, isn't there, in terms of the particular permissions because otherwise you run into the resource management regulations. Would you accept that? That's what Mr Matthews says.

MR MILES QC:

My understanding Your Honour, I might have to get assistance from my juniors here, but my understanding is that they're actually talking about slightly different things. The particular, the licences that the three dairy companies had was to emit particulates under a particular regulation. The regulation they're talking about is a different regulation. Now I'll, give me the break and I might be able to help Your Honour. It's a bit technical but I think I'm right. I think I'm right in saying that he certainly doesn't tell us what the cap is, and I don't think he tell us if there's any cap that was relevant to the three licences issued to the diary companies and whatever cap he's talking about under the other regulations the quarry might be operating under, is a different form of cap, which he doesn't tell us what it us, and of course doesn't tell us what the level of emission, in fact, is going to happen, because no one knows.

WILLIAM YOUNG J:

How is it relevant to the effect on the benefited land? I mean if there are caps on the emissions from the burdened land or other milk producing, the milk factories, what impact would the cap have on the benefited land?

MR MILES QC:

Of the benefited land? Well I suppose it might make it more expensive to operate. If it can only emit so many particles as it were.

WILLIAM YOUNG J:

I see, so are they under the same sort of regime?

MR MILES QC:

Look, I'll check on that Your Honour. My understanding is it's slightly different, that they're different sets of regulations, but I'm not entirely over that. What I am confident in saying is that Mr Matthews has no idea what the sort of emissions, if any, are likely to be a product form the benefited land, and what impact it would have on the cumulative effect, if you like, of the atmosphere at the time.

WINKELMANN CJ:

I did think that there was some traversing of this in the evidence in the High Court about this possible impact on resource consents.

MR MILES QC:

Yes there was. Yes there was indeed, and Mr Matthews, and they were cross-examined, Mr Comer was cross-examined, there was quite a lot of cross-examination actually on the possible impact the quarry might have, or put it another way, the impact that the building of a dairy plant might have on a potential resource management application by a quarry, and you'd expect that. Ultimately Justice Woolford said, I am satisfied that for the sorts of reasons that I've been talking about the benefit, or the effectiveness of the covenant is no longer there. Now I'm bound to say, Your Honours, that the compensation judgment, well, sorry. He came to that view really in both

judgments. That was part of the reason why he rejected the respondents' arguments. But he also covered the same point in the compensation judgment where he said that because I've already determined that the benefits no longer have any real benefit, because of the change in the neighbourhood and the other factories et cetera, I don't think there's any basis for any compensation. So he covered it really in both of those judgments. But they certainly ran the same arguments, it was just a different emphasis. There is, if you read the evidence closely at the High Court, there is the odd throwaway line talking about cumulative effects, but it isn't given the sort of emphasis that is now given in the later affidavits.

WINKELMANN CJ:
We'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

MR MILES QC:
(inaudible 11:47:33) Justice France's evidential point. If you go to volume 202 and this is a further affidavit by Mr Matthews, it's tab 41, he really deals with this issue at pages 277, 278, and he says at 12, and this is really the point I think Your Honour was focusing on, at 12 where he said the airshed in the vicinity can accommodate a limited quantity of particulate emissions, and I suppose what I had in mind is that there was no specific cap as such mentioned. There's simply a statement that there's a limit to how much can go into the air, and I suppose that makes sense. I would accept that. He then at 13 and onwards sets out the amount of particulates that each of the three factories are entitled to emit. At 13 you've got Synlait saying 1.25 kilos an hour. He says at 14, well, the capacity for further discharges may be restricted because of the Synlait. It's a potential issue. He says at 16 Winston Nutrition, they got a licence to emit 0.46 kilos an hour. That was quite recent. It was in October 2018. Yashili, first five years earlier, well, seven years earlier now, 1.62. And he says, well, at 18, the effect of these will

depend on a number of factors. The Synlait discharge is a significant portion. Well, it's actually less than Yashili's, but, of course, it's an element, so it might have to be taken into account.

My point was that he doesn't give us any basis on which to measure how serious this is because he doesn't tell us, just to take an example, just suppose there was a limit of, I don't know, six kilos per something or other and the three licences that have already been granted takes you up to six, just say. I could understand an argument so long as they then go on to say, well, it's inevitable there'll be particulates emitted by the quarry and you can see an issue. But until they actually tell us what the cap might be, which they don't, and until they tell us what the application might actually require the quarry to emit, is so speculative that my point is that really it doesn't take the issue any further.

ELLEN FRANCE J:
Thank you, while we're in his affidavit, at paragraph 23 he talks about the effect of the change in zoning and I understand the point that Justice Young made about economic effect, the economics of grazing this land, but as I understood Mr Matthews' evidence it was that you could lawfully continue with grazing.

MR MILES QC:
Yes, so long as it's continuous.

ELLEN FRANCE J:
No…

MR MILES QC:
Well, that's not quite right. If there's a gap of a year you can still apply, if you haven't grazed for a year, you can still continue so long as you get an application in over the next 12 months.

ELLEN FRANCE J:

So a total of two years?

MR MILES QC:

Yes. But the problem though, Ma'am, is that, and we touch on this at page 18 of my submissions at footnote 115, the *Mighty River Power Ltd and Ors v Porirua City Council* EC Wellington [2012] NZEnvC 213 case where Mr Matthews said, well, effectively his evidence says, well, they shouldn't have any difficulty in getting a resource consent. That's not – we don't accept that for a moment. If you go to footnote 115 we give you the quote, and actually the judgment is in the bundle, but we give you the quote, "A non-complying activity status is used to signal that the proposal will face more scrutiny and higher tests, so there will inevitably be a higher chance that the consent will be declined." Now when you go to the relevant section of the RMA it provides a consent authority may grant a consent for non-complying activity only if the adverse effects of the activity on the environment will be minor, or the activity won't be contrary to the objectives and policies of the relevant plans. The operative Waikato District Plan states that non-complying activities are, "Considered unsuitable or inappropriate in the zone and an applicant has to demonstrate exceptional factors or circumstances and make a very strong case before consent can be granted." If that's the, looks like the relevant standards that have to be applied, you could understand that the likelihood of the District Council, having gone to the trouble and expense of zoning 80 hectares industrial with all the works, the underlying drains and all the infrastructure that goes with that, the last thing they would be interested in is 7.2 hectares of that land being used for grazing. So it's a very speculative proposition that they would ever persuade the Council that they should get that, but it's entirely theoretical, of course, because it's never going to happen. It is used now as it ought to be as industrial land.

WINKELMANN CJ:

I was just going to say to you, Mr Miles, that the evidence referenced the part I have referred to which I see as significant because it tells us what Mr Ye is worried about is at 201.0150 and 151, and there he said he accepts the

proposition from counsel that his real concern is that it's an infant formula manufacturing plant.

MR MILES QC:
So, Ma'am, that the infant?

WINKELMANN CJ:
He accepts the proposition from counsel that it is an infant formula manufacturing plant that's being constructed there. He says it would be much better if it was a car manufacturing plant.

MR MILES QC:
Yes. Well he knew what was happening when he bought the land.

WINKELMANN CJ:
Well he was entitled to take the point of view though, wasn't he, that he would entitled to enforce the covenant just as your clients were entitled to take the point of view that there was no proper basis for it to continue. Anyway.

MR MILES QC:
Yes, yes, I see that is in the cross-examination. Would he be opposed to it, yes, much better, what I can say, no food, but clothes, toy, building, all good, the dust on the formula just not compatible. Well I don't know, to me the whole issue has been dealt with by the undertaking. Synlait is not objecting. Indeed will support it. It's just become a – essentially it's become a non-issue as a consequence of Synlait's undertaking. Of course around the edges you can construct possible scenarios that would be, that might conceivably have some impact, but in those circumstances, even if there was enough evidence to even justify a finding that it might happen, the obvious answer is compensation. That's precisely where the further amendment kicks into play because even the Court of Appeal accepted that the impact on the respondent was purely economic. It gets trickier when the covenants deal with views and privacy, where the values that underpin privacy and views aren't necessarily the same. It's harder to actually turn those values into

compensation because they just, to many people they are uncompensatable. But here it's purely economic. If there is any impact, if it's harder to produce whatever it wants to produce, it's economic, and that's an issue of compensation, and the Judge held that there was no provable detriment, economic detriment and said no compensation and that's the end of it. The respondent appealed. The Court of Appeal dismissed that appeal because they obviously thought it was unnecessary, given the findings that the application itself had required. There's been no appeal from that judgment, that's the end of it.

Now over the page at 19 amongst the other disadvantages of course, which I've already touched on, Your Honours, the economic issue. The capital value of the Pokeno land has increased as a rezoning. Significant increase in rates of course, which is part of the new evidence I think, and a significant increase in value. I think there's evidence that in 2011 it was valued at approximately a million. When this evidence went in the rateable value was $13 million. So the restrictions clearly have a greater impact the more valuable the land is.

WILLIAM YOUNG J:
As a matter of interest, do the restrictive covenants not affect the value of the land for rating purposes?

MR MILES QC:
I don't know the answer to that Your Honour.

WILLIAM YOUNG J:
Because if it can only be used basically for farming then despite the…

MR MILES QC:
I think the answer, and I'd need to go back to the affidavit, but the evidence is that undoubtedly the rateable value has gone up.

WILLIAM YOUNG J:

Yes I understand. I saw that, it's certainly in the new evidence, I don't know if…

MR MILES QC:

Yes, so I don't think the covenants play the slightest part in that value, they're simply valuing the land as industrial land.

WILLIAM YOUNG J:

Assuming it can be used for its highest and best use.

MR MILES QC:

Yes. Now at 43 we start getting into a little more detail into the irrelevant factors that they took into account or didn't take into account. I'm going to have to take Your Honour to a number of the paragraphs in the judgment which are dealt with over the next three or four pages. So if we go to the judgment, tab 27, at 43 the first point that we discuss is dismissing the change in zoning as irrelevant or of insufficient weight and, if we go to paragraph 93, Their Honours said this, "Here, the covenants prevent development regardless of zoning." Well, of course they do. "And Stonehill, as the owner, cannot in our view seek to circumvent the covenant and extinguish property rights simply by arguing the land has been rezoned. Despite the change in zoning, the covenants continue to impose much the same disadvantages to the servient land and provide much the same advantages to the dominant land. Arguably the change in zoning enhances the value of the covenants if NZIPL wish to develop a quarry." Well, we clearly disagree with each of the points made in that paragraph. For the reasons that I have already discussed with Your Honours, the change in zoning has significant impacts both on the servient land and what is now non-complying activities on the servient land and the disadvantages to the dominant land. The primary disadvantage of course to the dominant land mean that the area, the other industrial that Yashili and Winston are on have so transformed the environment that all of the problems that Synlait might have thrown up of course have been thrown up by the others. So zoning has had a significant material impact on the way

the land can be used and the way the covenants can be used, and this was exactly the reason why Justice Katz in *North Holdings* and Justice Gault in the case that I handed up to Your Honours determined that the change of zoning was a significant –

WINKELMANN CJ:
So at the time that Winstone's secured this covenant they were acting to protect an existing right of use that they had?

MR MILES QC:
Yes.

WINKELMANN CJ:
So they were acting to prevent a piece of land, neighbouring land, developing the use of that land in a way which impacted adversely upon their as of right use?

MR MILES QC:
Yes. Because all of the surrounding land was rural.

WINKELMANN CJ:
And after the zoning change it was no longer impacting upon an as of right use but a use for which they had to obtain consent?

MR MILES QC:
Correct. Because the resource consent had lapsed, it lapsed in 2009. By the way, Your Honour, when I just used the word "Winston" what I actually meant was Winston the nutritional plant, so that the change of zoning, which of course altered the significance of the land surrounding NZIPL and hence entitled Winston Nutritional as well as Yashili to be able to build their plants, thus having of course that fundamental effect of the efficacy of the covenants.

ELLEN FRANCE J:

Just in terms of *North Holdings* and the Justice Gault judgment, in both of those cases, am I right, there was then a direct conflict between the covenant and the zoning?

MR MILES QC:

Yes.

ELLEN FRANCE J:

That's not quite the case here, is it?

MR MILES QC:

Yes, I would say it exactly was, Your Honour.

ELLEN FRANCE J:

Why is that?

MR MILES QC:

Because a restricted use, as insisted on by the covenants, is non-complying under the new zoning. It's exactly the same, I would suggest.

ELLEN FRANCE J:

So on that approach any change in zoning would be sufficient?

MR MILES QC:

If it impacted on the benefits and disadvantages of the respective lands, yes. It has to have an effect. It has to have an effect on the ongoing efficacy of the covenants, but normally it would. The change is arguably in the zoning in both *North Holdings*, and in Justice Gault's judgment, were not as significant as I suppose the dramatic change here.

ELLEN FRANCE J:

Well in Justice Gault's one you wouldn't have been able to do what you wanted to do at all.

MR MILES QC:

Not sure about that Your Honour. I accept that I think Mr Matthews says that in theory it might have been possible to have applied under the old zoning here, to build a factory, but whether that was possible or not is just, it's too hypothetical. Certainly there's no question it's non-complying and what we're entitled to add to the fact of the mere zoning proposition is the effect that the zoning has had on the adjoining land. So that the neighbourhood has changed as a result of the change of zoning. That becomes particularly relevant, of course, in the next ground that we'll be coming to.

At 94 Their Honour said, "We do not consider that there has been a change, since the creation of the covenants, in the nature or extent of the use being made of either the dominant land or the servient land," et cetera. "We repeat that the covenants were entered into for a period of 200 years, or until any quarrying ceases. Some changes must have been in contemplation when the covenants were created. Such changes as have occurred… are either irrelevant, were precipitated by STL, or are of insufficient weight…" Again we challenge that proposition. Of course the covenant was for 200 years, but to suggest that that in itself is a factor that should be taken into account, we say is simply not part of the section, and to go on to say "some changes must have been in contemplation" I just a truism. Of course over 200 years there's going to be changes. The issue is whether at the time that the application was filed, there was sufficient changes that would justify the exercise of the Act, or under (b) whether the changes were foreseeable.

WILLIAM YOUNG J:

I was thinking that the 200 years was only one of the terminal points. The covenants terminate, quarrying stops. It's just perhaps a bit odd that they carry on when it never starts.

WINKELMANN CJ:

What do you say about the fact the Courts take into account the point about within contemplation, these things were within contemplation, because where does it sound in the statutory scheme?

MR MILES QC:

The first indication that there was going to be a change in the neighbourhood was 2007.

WINKELMANN CJ:

No but looking at the statutory scheme, the Courts are always referring to, well, that was within contemplation when this covenant was entered into, as they do here. Where is that appearing in the statutory scheme?

MR MILES QC:

It doesn't, oh, the only reference is only (b) where it has to be the new use, new reasonable use is not foreseeable at the time.

WINKELMANN CJ:

Yes, because it seems to me to have it as a free-ranging consideration across all of these factors might be problematic because it could – because these applications are notionally often being made by successors in title.

MR MILES QC:

Yes. I think in the big picture, Your Honour, what Parliament has consistently set out to do is to recognise that increasingly the status of land can change quite quickly, and that whatever the private deal was between a couple of owners 20 years ago, is time and again is no longer relevant, and that the bigger picture must be taken into account. I think that's one of the reasons why they introduced (e), the public policy issue, and the just and equitable where they're moving away, I think, from issues that are purely reflected by the use of the land or who the relevant owners are. But what isn't an issue, what has never been considered to be part of the rationale for applying for changes, is the fact that it's gone on the length of time of the covenant and the length of time that has actually gone before the applications arrived, and as I say, as for the – well, I've already dealt with some changes in contemplation.

ELLEN FRANCE J:

Just thinking about that in terms of amenity values, might not the notion that it was, I know that's not this case, but the 200-year point have some relevance there in those situations?

MR MILES QC:

I could imagine that if you're trying to protect a particular part of the environment, a unique part of the environment, you might want to negotiate, DOC, for instance, might want to negotiate a covenant. It would have an almost indefinite period and I can quite understand the significance of that. But this is just an economic issue here.

ELLEN FRANCE J:

No, I understand that. It's just that the statutory scheme has to apply to other situations, doesn't it, in terms of principle?

MR MILES QC:

I'm entirely with you, Your Honour, on this, because I think the way that those factors would be woven into the application is they'd say, well, there's been no change or that the neighbourhood has, I don't know, whatever it might be, and possibly there might be some covenants that Courts would say are so unique and iconic, to use that rather over-rated word, that they need to be protected for a length of time, but typically these sorts of covenants are really economic. They are based on economics and rational use of land and the environment.

The other paragraph which the judgment touches on this is, well, yes, it's just a throwaway line really at 103. "We don't consider the utility of the covenants is comprised by the rezoning or the merger," so that's just a repetition of the point that they've made earlier. It's really 93 and 94 that is the key paragraphs on that issue.

The next phrase under 43(a), dismissing the change in zoning and concluding that the only effect of the change in zoning was Stonehill's aspirations had changed, now that's a, if that was the case, then we'd be in some difficulty.

When you go to paragraph 99 that deals with this, they say, "We are not however persuaded these changes increase the burden imposed by the covenants on the servient land in a different way or to a different extent from that which could have reasonably been contemplated." They are into change in the neighbourhood here but it – the covenants were entered into relatively recently. They have a long term. Change must have been contemplated. So we're back into that proposition. "Further, the burden on the servient land has not changed. It is only the zoning, and therefore the aspirations of STL as owner, that have changed." With respect, that's a very misleading proposition. The aspirations haven't changed. The zoning changed. As a consequence the owners are entitled to rely on the zoning and to construct their business activities on the basis of the appropriate zoning. Got nothing to do with just a change of aspiration. "The changes in the character" – "There has been increased development on surrounding land, but that land was never subject to the covenants," and of course it wasn't. What His Honour is talking about there is the commercial land that was zoned in 2012 that Yashili and Winston Nutritional and Hynds factories are now on, none of it of course was subject to the covenant. But because they're effectively the same, they face the same issues as Synlait does, they have negated the point of the covenants. So this is a case where the fact that surrounding land is not covered by the covenants is particularly relevant because once the character changes so does the impact that that land has on the benefited land.

Now, Their Honours go on to say, "The changes in the character of the neighbourhood are likely to make it more difficult for NZIP to obtain resource consent, but the fact that the neighbourhood has changed in character doesn't mean that the covenants ought to be modified." Well, so long as it was unforeseen that is exactly the ground under (b). "The owners," His Honour goes on to say, "of the land on which the changes have taken place could always have objected to any quarry," et cetera. "The construction of the Synlait dairy factory has greater significance for NZIPL than any of the other developments in the neighbourhood. The factory will be closer to any quarrying activity, any adverse impact will be likely to have a more significant impact. The Yashili plant, the Winston Nutritional plant and Hynds are all

further away." Well, yes, by a few yards, if we're – I mean, Yashili, particularly if you take the extension which it's planning to do, actually abuts the boundary of NZIP. But in the real world where emissions and particles and whatever don't stop because there's a change of ownership next door, they just go into the atmosphere and another few metres' distance away is just literally irrelevant. You've seen on that photograph where Yashili is and you've seen where Winston Nutritional is going to be and where the pipe factory is, so these findings just cannot be justified on the facts that they had before them.

Now at page 20 under (b), disregarding the future use of the benefited land, if you go to paras 88 and – yes, under 88, Their Honours conclude that paragraph by saying, the last sentence, "The future use of the dominant land is not a relevant consideration." Well, that can't be right just as a statement of principle. It may be relevant, depending on the evidence. It's just another example of what I have been suggesting is the series of statements that have been built up over the years, restricting time and again the scope of the grounds under the section.

Under (c), talking about the length of the covenants, well, I've already discussed that with Your Honours and we've given you the relevant paragraphs 94, 99, I think I've taken Your Honours to those.

Under (d), declining to take into account any changes precipitated by the applicant. Well, this is another proposition which is being, you know, you find popping up in the judgments, that the Courts should be reluctant to consider an application by the original covenantor, for instance, or by the owner who triggers a zone change and then applies for leave. The short answer is, once again so long as the requirements of section 317 are met, it's completely irrelevant, both of those issues. In fact they're inapplicable here because Synlait, of course, had nothing to do with the original covenant, and it had nothing to do with the original zoning. But once again these are just dicta that appear in earlier judgments that have been reinforced in this Court of Appeal judgment.

Under (f), this is at 86 where Their Honours said, “Finding the only change to the burdened land since the creation of the covenants was Synlait’s construction of its infant nutrition plant, when in fact there’d been other significant changes, we’ve talked about those. But if you go to paragraph 86 where Their Honours said, disagreeing with the trial Judge, whose views they set out at 85, where His Honour said, “He expressed the view that the covenants prescribed the use of the servient land in a manner inconsistent with its present zoning.” His Honour said, well, that overstates the position. Stuart hasn’t sought to build on the servient land, within its property, as if that’s a reason why Synlait should be in trouble. “The only change in the use of the servient land is that foreshadowed by Synlait’s construction of its dairy factory, and a change in use by an applicant acting in breach of a covenant,” and that cannot be used as leverage.

It’s not being used. The construction of the factory Is not being used as leverage. That it simply is what it is. What is being relied on is the change of zoning which then makes it lawful for Synlait to build a factory. So it’s a very important distinction because running through this judgment, and it’s touched on in the submissions from the respondent, is that in some ways Synlait by building the factory when it did, and by the way it didn’t do anything significant until after the High Court judgment. I mean it introduced some earthworks and one or two minor starts, I suppose, to the building, but essentially it was the judgment in the High Court that triggered the serious development. But it’s not the building of the factory that is being relied on, it’s the change of zone.

Their Honours go on in the next sentence, which again with respect is wrong. “Although Ms Robertson submitted that STL hadn’t relied on the fact that development has occurred on its land, it seems to us that it has, in effect, done so, because it seeks to rely on the change of zoning and what it permits.” It relies on a change in zoning, not on the fact it’s built a factory. It’s entitled to do that.

Then at (g) failing to take into account all the other factories in the vicinity, I've discussed that in considerable detail. Disregarding the subdivisions et cetera, and I've discussed that, and each of the other two factors here I think we've already discussed with Your Honours, and similarly with (j) and (k).

Now (m), failing to consider the compensation. Nowhere in the judgment do they consider compensation, and the reason, presumably, they don't, is that having determined that Justice Woolford was wrong, and that the grounds for modifying the covenant hadn't been established, it was unnecessary to deal with compensation. But that's not the point. What the whole purpose of the introduction of compensation under subsection (2) in 2008 was that that in itself was a ground for modifying covenants. That if you could show that it was appropriate to modify so long as compensation was to be paid, then immediately a whole series of other possibilities opened up, and earlier on in my submissions Your Honour is a paragraph where we actually give you the comments of two or three High Court Judges in, what, in the '80s and '90s, saying, "We're not going to, we're nervous and uneasy about modifying because there's no compensation." And then the 2010 judgment of Justice Randerson in *Harnden v Collins* [2010] 2 NZLR 273 (HC), it's at tab 9 in the authorities, and it's a thoughtful judgment. You can just perhaps note paragraph 43, "The inclusion of the power to award compensation is a clear statutory indication that Parliament intended the Courts to have the ability to grant an application to modify even if it has the effect of causing some detriment." And later in the judgment – oh, and in paragraph 34, yes – he discusses the history of it actually at paras 27 through to 34. And at 34 he says, "This is a significant improvement to the exercise of jurisdiction, it enables the Court to order compensation," et cetera. Well, given the findings in the Court of Appeal that whatever anydetriment there might be was purely economic, it would have been a classic case for saying, "Maybe this is a case for compensation." We would submit that the probabilities were, given the evidence being what it was, that they'd have come to the same conclusion as Justice Woolford, that there was no discernible detriment that had been properly proved and hence no compensation. But it must be an error of law simply to ignore that ground altogether.

Now that's (a). 317(1)(b), Your Honour –

ELLEN FRANCE J:

Sorry, just before you go on to (b), under (a)(i), how is it you say that future use might be relevant?

MR MILES QC:

I suppose, yes, I suppose if there was evidence – let's take the quarrying, that's all in the future, but they've taken into account the fact that a resource consent application may be made and, if it were so, then it would have consequences which would be to the detriment of the owner. It's just an example of how future use can be taken into account.

ELLEN FRANCE J:

But you're looking at it, under (a), you're looking at, "A change since its creation in all or any of the following: the nature or extent of the use being made," of the two types of land.

MR MILES QC:

I'm inclined – well, there are two points I'm inclined to think it has relevance to (b) as a matter of fact, Your Honour…

ELLEN FRANCE J:

Yes, well, it was the submission that it was relevant to (a) that I was having some difficulty with.

MR MILES QC:

Yes. It kicks into (a) where if current factors such as the rezoning of the adjoining contiguous land into industrial purposes resulting factories, if that for instance is happening and has an impact then on the future use of the quarry because it now faces the difficulties that it might have faced with Synlait but it's now facing the others, that is in the future, that affects the future use of the land, I suppose.

ELLEN FRANCE J:

Yes, that doesn't instinctively – I mean the cases that are cited for the proposition in the Court of Appeal judgment are saying that under (a) you're looking at a particular period in time between the –

MR MILES QC:

Yes, you are but –

ELLEN FRANCE J:

– the date you enter into, in one case, the easement or the covenant and the time of the application for extinguishment which on its face seems to fit with the language of the section.

MR MILES QC:

Yes, and –

WINKELMANN CJ:

I must say I do wonder if we're trying to jam too much into (a).

MR MILES QC:

Yes, it's tempting. But again it seems it fits more comfortably into (b), but certainly, and maybe what I'm really saying is that the future use of the land actually is – it is the same use of the land now actually, come to think of it, because –

WINKELMANN CJ:

You are making a future assessment, aren't you, because if it's in the past but it's not going to carry on, well, it's an irrelevance, I suppose?

MR MILES QC:

Quite, and I think that the problems that they have with the use of the land now is the same as the future. I don't think there can be a difference in the future, come to think of it. I think I prefer, just on that element, to keep it within (b), so long as it's recognised that you can talk about the future impact on the

land from circumstances that are happening now or are clearly going to happen in the future. I'm comfortable with that proposition.

Now under (b), Your Honour, there is a disagreement between us and the Court of Appeal and my friend's submissions on quite how 317(b) works. Let me take you to what the Court of Appeal says should be looked at, and you find that really at 110. Well, let's go back to 107 which is where they start the discussion and they set out correctly the section, and what it's talking about is if there is a different but reasonable use of the land that is now open to the owner that wasn't foreseeable at the time of the covenant, then that's a ground for modifying the covenant, and that's certainly the way Justice Katz construed in *North Holdings*, that's the way Justice Gault construed it and it's, with respect to the Court of Appeal, it's the only logical way of construing it. Now what they have said though at 108, half way down, six lines down, it is the manner or extent of the impeding of the use which must have changed in ways not originally reasonably foreseeable. Therefore, if the manner or extent of the impeding of the use remains the same, the grounds won't be made out. Neither will a covenant be modified or extinguished where the applicant has purchased the servient land knowing of the covenant, and the reliance of the dominant land owner upon it, but wishes to change the use of that land in order to achieve that end. Where it is the applicant's intention or circumstances alone that have changed, the ground won't be met. Of course it won't. We've never suggested for a moment that it would. You have to establish objectively one of the grounds under 317.

Now expanding on that proposition that it's the extent of the impediment which needs to change, they say at 110, "We agree the impediment to the reasonable use of the servient land hasn't changed. Since the covenants were entered into, they," that's the covenants which is the impediment, "have prevented development on the servient land, regardless of its zoning." Of course they do. That's precisely what the covenants do. "The restrictions were contemplated from the outset, and they are now no different from those which were foreseen." But if His Honour is meaning that the covenants remain the same, and they still have the same effect of course they do.

They simply restrict us, as always, from doing anything other than grazing. "The covenants are notified against the titles to the servient land, and arguably any use which is inimical to the covenants cannot be considered a reasonable use of the land." Now that just cannot be right, because that completely negates the entire point of (b). If the use changes in any way other than grazing, it's not a reasonable use of the land, and that's what Their Honours appear to be saying and, as I say, that just cannot be right.

"The covenants… remain more restrictive than the zoning," of course they do. That's why we're having to remove them, "And they continue to provide a higher level of protection to the dominant land." Well of course they do. Invariably that happens when you're applying to have them removed. "We repeat that the term of the covenants is such that restriction on future use must have been foreseeable. STL purchased its land with knowledge of the covenants. It knew or ought to have known that NZIPL relied on them." It certainly didn't when it bought them because NZIP hadn't bought it at that stage, but that's by the by. "Mr Ye refused to agree to their discharge." Lastly, "It is simply that STL wishes to change the use of its servient land and it seeks to modify… the covenants... There is nothing to suggest that the reasonable use of the servient land is impeded in a different way or to a different extent."

So what, there are two or three propositions in there that we disagree with. Obviously one that I've just been talking about, but secondly, the fact that somebody bought the land knowing about the covenants, that that is an issue that somehow influences or would prevent a purchaser from then applying to modify. Of course a purchaser knows about it, they searched the title. They know perfectly well when they buy it that the land is subject to it. The issue is whether the circumstances have so changed that the covenant ought to be modified. But coming back to this emphasis they have placed, not on whether there's now a different use of the land –

WINKELMANN CJ:
Different reasonable use.

MR MILES QC:

Yes, different reasonable use, quite, but they're not concentrating on that. Basically they say well you can't have any reasonable use that is outside what was originally agreed to. But they emphasised that what really should be looked at is whether the covenants are preventing the, whether they have changed in any way. Of course the covenants prevent new reasonable use of the land. They're saying instead of looking at whether the new use is reasonable or not, and secondly whether it was ever foreseeable, they're saying have the covenants changed, and of course the covenants haven't changed.

ELLEN FRANCE J:

Is that right? That they're saying the covenants have changed?

MR MILES QC:

Well they're saying the covenants haven't changed.

ELLEN FRANCE J:

Well aren't they, the section there talks about, "The continuation in force of the… covenant in its existing form would impede the reasonable use of the land in a different way."

MR MILES QC:

Yes.

ELLEN FRANCE J:

Isn't that what they're talking about there?

MR MILES QC:

Well if they are – well, I think what they're talking about, it maybe just ambiguous Your Honour, and we may be reading too much into it, but what it appears to us that they are saying is that instead of saying, instead of concentrating on is there now a new and reasonable use of the land that wasn't foreseeable, instead of concentrating on that, they're saying, well, you

look at whether the covenants have changed, and if so what impact that might have.

WINKELMANN CJ:
Well, whether the effect of the covenant has changed.

MR MILES QC:
Or the effect of the covenant, yes. Well, it's both yes and no…

WINKELMANN CJ:
Well, and you say the effect of the covenant has changed and you've assessed that by looking at how it operates on the reasonable use, so it's changed, because it's far more restrictive than it ever was.

MR MILES QC:
Yes, quite. But we're also saying that all you need to do when looking at this section – because you have to look at the purpose of it, the (a) is talking about existing uses and whether that's still appropriate in one way or another, (b) is bringing in another alternative altogether, its' saying, well – and keep in mind that under (a) foreseeability isn't an issue, it's just straight objective change, (b) is all about foreseeability, about a new and reasonable use. So if the circumstances have so changed that the two criteria are met, then that's a separate ground altogether, and what we're suggesting is that the only rational analysis that would be appropriate here is you simply look what was the use of the land back when the covenants were signed, what's the use now, is it reasonable, was it foreseeable? I would have thought it's unarguable that it's reasonable, the only issue, was it foreseeable, Justice Woolford had no difficulty in saying it wasn't foreseeable, and of course it wasn't, because we know that the first indication that there was any change in the character of Pokeno and neighbourhood was 2007 when a serious report was undertaken turning the "village", in inverted commas, into, what was it, a rural town, I've forgotten what the phrase is, and recognising that it was now going to be an industrial hub as well.

WINKELMANN CJ:

So you're saying that the reason the Court of Appeal is, that it can't be a reasonable use, that's a breach of the covenant, undoes the statutory scheme because (a) is talking about actual use, facts in the ground, changing the benefit and burden, and (b) is talking about reasonable use, which would occur if the covenant wasn't in place, so, and that's changing the benefited, burdened?

MR MILES QC:

And which wasn't foreseeable at the time, yes.

WINKELMANN CJ:

Yes. So it would deprive the statutory scheme of its force if the covenant defined the reasonable use.

MR MILES QC:

Quite, yes. And let me just take you to the *North Holdings*, which is tab 14. Now bear in mind, Your Honours, this was a change of zoning case and at para 31 where she looks at the subsection she says, "The limb raises three issues: what reasonable use of the land currently be put to, what was the previous reasonable use of the land," I'd be inclined to put it the other way round but that's by the bye, "Has the reasonable use of the burdened land become different from that which could reasonably have been foreseen by the original parties?" So, simplifying it a little, what was the use at the time when the covenants were entered into, is there now another and reasonable use and was it foreseeable, and that's precisely what that section was aimed at. And Her Honour said at 33, "Following the zoning change, the covenant impedes the reasonable use of the burdened land in a different way or to a different extent than at the time the covenant was created," and so on. And at 35, "No evidence that North Holdings or any other party foresaw the possible zoning change. If they had, it would be reasonable to expect the covenant would be a different form."

And Justice Gault in *Barfilon Investment Limited* [2019] NZHC 780 at paras 34 through to 36, at 35 he adopts *North Holdings*. He said taking the same approach, the current reasonable use of the land, reference to zoning, is the new zoning. The previous reasonable use, under the former zoning, was rural plains. Following the zoning change, the covenant impedes the reasonable use of the burdened land in a different way. You know, it's not a complicated analysis.

The only other case that I'd refer briefly on this is the Court of Appeal judgment in *Okey v Kingsbeer*. That's tab 15.

WINKELMANN CJ:
Judgment of Justice Woolford's?

MR MILES QC:
Yes, quite. At para 53 Your Honour said, well, you've got the distinction between (a) and (b). (a) focuses on the use of the dominant and servient land. The focus must be on the impact of the change on the benefit or burden flowing from the easement, rather than the fact of change alone. By contrast, (b) focuses on the foreseeable imposition on reasonable use of the burdened land. And the last line, the imposition on the reasonable use of the burdened and its foreseeability. And at 55 on the facts, "We don't consider the easement impedes the respondents' reasonable use of their land in a different way," and that's what could have reasonably foreseen. I mean, on the facts it was just about, it was an easement permitting trucks going up and down a driveway and the issue was was it foreseeable that there'd be more trucks in the future and they said perfectly foreseeable. But the only reason I'm referring it to Your Honours, apart from being a recent Court of Appeal judgment, is that it does make it clear that it focuses on the "has there been a change" on the use of the land and is it foreseeable.

317(1)(d), Your Honour, well, that's a mop-up clause really which I don't need to – all the factors that I've been taking into account could be taken into account here. It has been used in one or two of those judgments I've been

talking about where, for instance, the neighbourhood hasn't changed or – and so they've used change of zoning under this clause, but it's not a clause that I need to take you through because it's the same factors.

WINKELMANN CJ:
(d)?

MR MILES QC:
(d), yes.

WINKELMANN CJ:
So it doesn't substantially injure any person entitled?

MR MILES QC:
Wait a minute. No, you're right. Sorry, Your Honour. What I had in mind was (a)(iii), the all other factors. So no, (d), of course, it is different ground altogether.

Now there's an obligation here on the covenantor to show that the modification is not going to result in any substantial injury, and the heart of it, of course, is the impact of the other factories and the undertaking and the change of zoning. I mean those three factors, they all interreact, and the net result of that is to reduce any likelihood of impact or economic injury by Synlait to something that's negligible.

We have given some details here, Your Honour, of where in the respective cross-examinations the witnesses made it clear that, the speculative nature I suppose of any possible injury. The Court of Appeal –

WINKELMANN CJ:
Do you take us to the Australian authority which has got quite a nice statement about what is a substantial – it's referred to in one of the New Zealand authorities.

MR MILES QC:

Yes, there's a New Zealand authority that quotes the Australian one that says it has to be real and tangible, and of course we adopt that as being an entirely appropriate test.

WINKELMANN CJ:

I'm just trying to recollect the New Zealand case.

MR MILES QC:

Yes, my junior is going to tell Your Honour in a moment where we find that. But that must be right, because otherwise – let me start again.

WINKELMANN CJ:

I think it's in the *Pollard* case.

MR MILES QC:

It has to be evidentially based, this ground, and if the consequences of those three factors that we're talking about have the inevitable result that – oh, it's *North Holdings*, that's tab 14, paragraph 39, yes. "I consider in the context it does not mean large or considerable but it means an injury which has present substance, not a theoretical injury but something which is real and has a present substance." I suppose, put slightly more pragmatically, something has to have some evidential basis rather than being pure speculation.

O'REGAN J:

How does that inter-relate with subsection (2) about compensation?

MR MILES QC:

Yes, quite. I suspect it does, that if you find that it doesn't have that sort of impact well and good, then (2) becomes irrelevant. If it does have a substantial impact and that impact can be sorted out on an economic basis, then you'd think (2) would click in.

O'REGAN J:

It's not entirely clear though, is it, because arguably if you decide it does substantially injure then you haven't got a basis on which to exercise the power under (1)?

MR MILES QC:

And it's awkward. But given the point of (2), which seemed to me it has to be something more than just a discretionary issue, it has to be an element significant enough to permit a modification that mightn't otherwise be made, I think at the least it has to have that. And it fits comfortably enough with (a) and (b), it is awkward with (d), and for myself I would remove the awkwardness by concentrating on the proposition that we showed that there hadn't been that element of real tangible loss. But just suppose that there was legitimate evidence indicating that the cost of a resource application has either impacted on the economic benefit as a whole of the quarry because you can't do as much quarrying, or just suppose that the limits require significant more infrastructure to enable the control of the particulates. Either of those propositions would seem to me entirely appropriate for compensation. But there must be some evidential base, and what happened in the High Court is that the respondents did file evidence indicating that this would have an impact, they chose not to go to the next step of indicating what the cost of that might be, there's no evidence of that whatsoever, it was all, "It might have this impact," and, you know, "We might quarry the land. If so, we would file a resource management application, which might be impacted by Synlait." But they never went to the third step and, if so, the expert miner, engineer, says, "Look, I've had a lot of experience with this, I know a lot about quarries. Depending on size of it, the amount of particulates that'll go in the air will be X number per kilogram. You can control this, or you can't control it, I don't know, but whatever it will be there will be cost to this and typically the cost will be the more sophisticated machinery, or you can only have a quarry that's a third of the size. I can tell you that the economic benefit of a full quarry is a million and a half a year, but they're only going to get half a million on this. It's a perfectly standard quantifiable analysis." Now the reason, one can only speculate on why the respondent chose not to introduce that

evidence, because compensation was a factor there, you know, the second judgment of Justice Woolford dealt with compensation. So the only reason that I can envisage as to why that evidence wasn't called, given that they went out of their way to produce the first categories of evidence, is, "Well, we don't want to move the emphasis from the applications should be dismissed to the applications should be granted but subject to some money, we really don't want the modification at all. So let's not even give a hint to the Judge that that's an alternative," and that's, and the risk of course is that they might lose on the substantive issue. But that's not a great risk because if they lose on that they're unlikely to get compensation anyway. So it was in all probability a deliberate decision, but certainly a decision was taken that that evidence shouldn't be called. And the evidence now before Your Honours still doesn't take the issue any further in terms of assessing what any economic loss might be, the speculation is still there about whether there's any likelihood of any impact of any sort, but there's not the slightest attempt to measure that in terms that would permit a Court to compensate the respondent. So the upshot of it all is, I think, that at best Harrison – I've got fixated with this Harrison – at best Matthews simply speculates that there might be quarrying, there might, if so, there might be an application, Synlait might be a factor, but given all the other factories, et cetera the inevitable conclusion would seem to be that any compensation would be negligible because the effect is negligible.

WILLIAM YOUNG J:
Can I just ask you – it's nearly 1 o'clock – but I'm looking at this photograph, do you know the photograph I'm…

MR MILES QC:
Yes.

WILLIAM YOUNG J:
Was there at one stage a quarry? There looks…

MR MILES QC:
Never, Sir.

WILLIAM YOUNG J:
So what's the excavations?

MR MILES QC:
I think it's Synlait.

WILLIAM YOUNG J:
Yes, well, so it's an excavation?

MR MILES QC:
I think that's, because they're planning to extend too at some stage, or somewhere in the future –

WILLIAM YOUNG J:
So do you know what, can you recognise where I'm putting my finger?

MR MILES QC:
Yes, yes. I think it's, they're earthworks of Synlait's and they're just – is it parking or something? – anyway, it's never been quarried, Sir. It is part of Synlait's, of course that's not covered by the covenant, and it's just more earthworks.

WINKELMANN CJ:
All right. So shall we take the luncheon adjournment, Mr Miles? How much longer do you think you'll be after the break?

MR MILES QC:
We're going reasonably well, Ma'am, although – I hope that's still apparent. Depending on the extent to which you feel the need to be taken to some of the cross-examination of the experts, and I could probably do that in 15 or 20 minutes, but you may not even wish me to do that, but I can.

WINKELMANN CJ:
Right, we'll discuss it over the adjournment.

MR MILES QC:

Yes. And from then on there's discretion…

WINKELMANN CJ:

And procedural matters and costs?

MR MILES QC:

My junior's going to discuss costs with you. Because costs are actually quite an interesting issue, indemnity costs and should the loser still be entitled to its indemnity costs in the circumstances. So it's got an importance, a more significant importance than most cost issues do.

WINKELMANN CJ:

Yes.

MR MILES QC:

But I think she anticipates that she would only be 15 or 20 minutes on that.

WINKELMANN CJ:

If that, she says. Right.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.16 PM

MR MILES QC:

Your Honours, on page 25, I think, of the submissions. Actually, 23.

WINKELMANN CJ:

It would be helpful if you just quickly took us to the evidence reference you rely on in the – because it's said against you that your witnesses made concessions.

MR MILES QC:

Yes. The ground we're looking at, this is page 23, Your Honours, under (d), where the modification won't substantially injure any person. Now we set out those factors from 48 through to page 25. Each one of those are propositions that I've already discussed with you broadly all aimed at showing that the combination of the rezoning, the other factories in the immediate area plus the undertaking have effectively reduced the benefits of the covenant to largely being irrelevant and hence no detrimental effect if they are modified. The only additional evidence was the evidence where they sought leave to rely on that further evidence which I've also discussed essentially with Justice France, I suppose, and what I'm going to do, Your Honours, is I'm going to discuss briefly the mis-stating of the expert evidence and then I'm going to take you to some of the cross-examination of the experts just indicating the, I suppose, just how really, how speculative the evidence is that it could be anything other than marginal damage.

At 49 where we say there were a number of findings by the Court of Appeal, you will find them all at paragraph 115. There's a series there of four concessions, I suppose, that Their Honours considered Mr Comer had made in cross-examination, that it would make it, that Synlait's involvement would make it more difficult to obtain resource consents for a quarry, it could mean there are tighter controls, could be one reason why the local body might determine not to grant it and could make it more difficult, and at 117 the STL's other planning expert, Mr Scrafton, acknowledged that it would be easier to obtain resource consent if a dairy factory didn't exist. He qualified it by saying he didn't know enough about the sensitivity of a dairy factory to suggest existence would be a silver bullet preventing resource consent but it would be one of many potential receivers.

Just note by the way that reference to "silver bullet" because I'll come back to that.

WILLIAM YOUNG J:

Just one matter of clarification or frame, under the proposed plan is aggregate extraction a restricted discretionary activity?

MR MILES QC:

It's…

WILLIAM YOUNG J:

Mr Galbraith is helpfully nodding.

MR MILES QC:

You mean this is the proposed…?

WILLIAM YOUNG J:

Yes, the proposed plan. So it's still awaiting an…

MR MILES QC:

Yes, it's relatively – it's pretty much at the start of the process, Your Honour. I think it was kicked off 2018 and the sense is that, of course, until it gradually morphs into something more tangible not a lot of weight can be placed on it. But there's no question that the intention of the Council is to rezone the benefited land rural and there's the cross-application, as it were, by Mr Ye to zone it residential.

WILLIAM YOUNG J:

Okay, so currently under the operative plan, if that's the right expression, is it a restricted discretionary activity?

MR MILES QC:

Yes.

WILLIAM YOUNG J:

And do we know what are the matters in respect of which discretion has been reserved? Is there a page I can look at?

MR MILES QC:

We'll check, Sir.

WILLIAM YOUNG J:

Thank you. Okay, thanks, no hurry.

MR MILES QC:

Really, Your Honours, what I've done at paragraphs (a) through in Roman numerals (i) to (v), we've given you the references in the footnote to what was actually said and I think it's probably fair to say that yes, Mr Comer and Mr Scrafton would have said, well, yes, it could be one factor, and the Court says, well, Mr Comer has conceded that it could be one reason. Now on a very technical level yes, there is a, "He has said yes, it could be," but when you go to the cross-examination you see the context. It's the classic on every occasion, it's the classic response of an expert saying, "Well, I suppose yes and I suppose it could be," but it's clearly his view that it's unlikely. It's certainly not going to be determinative and unlikely to be a factor that would be of significance. So I think it's that fine distinction that we're making here.

With that acknowledgement, Your Honour, I can take you to a few of those if you would like me to.

WINKELMANN CJ:

Yes.

MR MILES QC:

Okay, well, let's take at Roman numerals (iii) where at 115(c) His Honour said, that the involvement of Synlait –

GLAZEBROOK J:

So which volume?

MR MILES QC:
This is the judgment.

GLAZEBROOK J:
The judgment?

MR MILES QC:
Yes. At paragraph 115, where His Honour said, well, the existence of a dairy factory, at (c), could be one reason why the local authority might determine not to grant resource consent.

If you go to 158 at volume 201 at page 108 and you see halfway down, "The existence of the plant could mean that there are more tighter controls in relation to mitigation steps? It could. So, to summarise, you accept that a quarry would have actual and potential effects on an infant formula manufacturing plant? It would have a range of effects. The degree and extent of those effects we simply don't know because we don't have a proposal in front of us. And the existence of the infant formula manufacturing plant is a factor, it could result in more onerous standards being applied? Through the resource process the effects of that quarry activity would need to be considered over the wider receiving environment, but the milk powder factory that Synlait is looking to operate would be only one part of that. And the existence of that factory could make it more difficult to obtain resource consents? It could, but I'd suggest that it would not be the determinative factor on whether consent was granted or not because the effects are more wide-ranging than on the Synlait factory only." So, you can see, it's just more nuanced, I think, than the blunt statement he conceded, et cetera.

And while I have that volume here could I just take you to two or three other quotes from his evidence, because you'll see that this plays back into the issue of is the existence of the factory likely to cause any major impact on any resource management application? At page 104, just on the same volume, line 9, "You've accepted the existence of the plant would be a factor in a

number of the," blank, "in the decision making process? It would be one factor. When you think of the receiving environment there are a range of other factors and other activities of a similar nature. But if that wasn't a factor, if it was taken out of the equation, it would, all else being equal, be easier to obtain resource consents and operate a quarry? There would still be a range of effects that would need to be assessed by Council, including the effects on the existing Yashili milk powder factor. So you accept there would be effects on the Yashili powder factor? Potentially. And they would be a factor that would? Well, they're part of the receiving environment. So you say that the existence of the Yashili factory, that that makes it more difficult? No, I'm not saying it makes it more difficult, I'm just saying it's part of a receiving environment, and the nature of the quarry activity would need to be assessed, the effects associated with that would need to be assessed in the context of the receiving environment."

Once again, just, there are elements which are just impossible to assess how significant they might be. And again, just at the bottom of page 107, line 30, well, line 27, which is the question, "The existence of the plant would make it more difficult to obtain?" that's the resource consent, "more difficult to obtain regional air discharge consents for a quarry than if the land was farming land? Only in the context that they would need to be an assessment of effects on the wider receiving environment, just not on the servient land, and so council consideration of effects will be far wider than the assessment you're asking me, which is simply an effects-based assessment on the servient land only. The receiving environment and the effects of the quarry would need to be assessed comprehensively."

If Your Honours wouldn't mind going to volume 202 which was dealing with Mr Matthews, and at page 170 where he's being cross-examined and at line 9, "So those are the other factors that will be considered as well?" "They are other factors." Sorry, we'll go back to the earlier question, line 4. "Do you accept you would've heard the evidence this morning that the receiving environment is greater than just whatever is across the boundary and includes other industry near the dominant land?" "Yep, certainly."

"So those are the other factors that will be considered as well?" "They are other factors that could be considered in a consent application, yes, and then this becomes issues of proximity, what the nature of that environment is that's been affected and so on, range of things would need to be considered." "But the presence of an infant formula manufacturing plant on the servient land, do you accept it's unlikely to be determinative of any application?" "I don't think I can make that judgement for the very reason you gave that we can't make that judgement at the moment when we don't have an application in front of us." I think that's really the heart of my proposition that for the various reasons I discussed it's just too speculative. They just do not know. "And it's a quarry for which the effects are completely" – "And if it's a quarry where the effects are completely internalised would that have an effect?" "Well, it's a possible outcome." So don't we come down to the fact the infant formula manufacturing plant might or might not affect an application for resource consent?" "It may or it may not. It would just have to be considered."

Then bottom of the next page, Your Honour, 171, again lines 27, long question, "Am I right in understanding your evidence you believe Synlait, you believe the infant formula manufacturing plant on the site means Synlait is likely to an application for a resource" – I think it means likely to affect an application for a resource consent, and the answer, "I'm not directly saying that. I think I'm saying more that there's an opportunity for that to occur." You know, it's become as vague as that. "That it's a potential effect you would need to consider because it's an infant formula factory. Maybe it's something they should take into account." "So are they more likely to take it into account if it's," they're talking into about the Council, "if it's raised by way of an objection from Synlait," keeping in mind, of course, Synlait has undertaken that it won't, and the answer is, "They," the Council, "probably are, but I equally think the Council in the situation they're looking at here with a significant industrial zone will be looking at ways that they will make sure that the industrial zone is looked after if you like, if that's the right word, and looked after into the future and so we'll be looking to see what other activities occur

close to it to make sure they don't compromise future activities in the industrial zone."

Seems a significant answer really given that this is the expert witness from the respondent simply saying that the District Council will seek to protect its industrial zoning and to ensure that actually it will continue to operate in the way they want it to operate and they're not going to compromise those activities by any consents that they might or might not grant. So it's just another factor, Your Honour, in the ultimate difficulty, I say, which is insuperable that the respondents have just failed to show any legitimate evidential basis for any damage that might occur in the event that the covenants are modified.

So just completing that section, yes, well the last point, once again, is simply failing to deal with the compensation issue, and I had that discussion with Justice O'Regan on the relevance of the compensation to this particular ground, and it is awkward, but nevertheless Your Honour there's no indication in the framework that it is to be treated differently from the other grounds. It might be more difficult to comfortably fit the payment of compensation into a finding that – well, yes, no, it's awkward if they reach a finding that there is going to be serious damage, but nevertheless compensation should deal with it. You could see how that could occur in a case where the damage is likely to be economic. For myself I would find it difficult to see how it would be used, or more difficult for it to be used where the loss might be something as intangible as some dramatic view for instance. But where it's only economic, even if it's significant, so long as it can be adequately compensated for, then I'd have thought that the compensation issue would apply to that ground as well.

(e) and (f) Your Honours, it's an awkward situation this. They weren't relied on in the application, and I've explained it, it's clear why they weren't relied on. Nevertheless by the time the case reached the Court of Appeal (e) and (f) was part of the law. At the very least the Court had to take the (e) and (f) into account when giving its views on the way that 317 should be construed, and

the fact that it was yet another example of Parliament opening up new and wider grounds for reviewing covenants, should have been part of the theme, I suppose, running through the judgment, that that is an important element in the section as a whole, and why all of the older judgments that hadn't taken into account that lessening of – sorry, that increase in the ability to modify, that those views really are of limited use now.

How one construes public policy, there's very little law apparently in New Zealand. The only case that we have given you is, to be frank, a sort of throwaway line of Justice Doogue in one of Justice Doogue's oral judgments, but it nevertheless makes the good point that public policy ought to be construed generously, and in the context of land law and zoning issues and the interplay between the private interests and the public interests as expressed by district councils and district plans, then public policy ought to take into account the zoning requirements.

WINKELMANN CJ:
Well mightn't it be intended to capture things such as if you're using a covenant for an illegitimate purpose –

MR MILES QC:
Yes.

WINKELMANN CJ:
– such as pursuing anti-competitive behaviours, that kind of thing?

MR MILES QC:
Yes I do. Yes. I mean it's easy to use some extreme and slightly silly examples, but suppose the clause was, no persons of colour should be entitled to have the land. I mean that's an extreme example but to construe this section in a way that is going to be helpful to the profession, I think it has to be looked at in the context of an environment where covenants registered on the land can be removed on the grounds of public policy and what public policy is likely to be involved, the most likely, are zoning issues, and, of

course, it would be wider still along the lines that Chief Justice mentioned. Let's assume it should be construed widely for a start, which seems appropriate given that they've gone to all the effort to put it in. By the way, you'll get no assistance in Hansard or the Law Commission. They are basically throwaway lines saying it might be useful but without actually assisting us in precisely what way it might be useful, and similarly with the just and equitable, and wondering as we did, Your Honours, where that ground might kick in where the others didn't. You could visualise. Just take what happened here and just perhaps the Cleavers up against the resources of Winstone's may have, and it's just pure speculation, but may have agreed to those covenants faced with the threat of ongoing litigation or whatever it might be from Winstone's. So it would enable a Court, I think, to say is there any objective legitimacy for this covenant? Does it appear on the face of it just to be unreasonable for one reason or another? On that ground now Parliament is saying you could have it removed. So, and we –

ELLEN FRANCE J:

I wasn't sure, Mr Miles, that the Law Commission's observations were unhelpful.

MR MILES QC:

Remind me, Your Honour, I…

ELLEN FRANCE J:

It's at the respondent's bundle of further authorities at tab 7 and they are talking about covenants in gross may be contrary to public policy and impose unfair obligations on landowners in perpetuity, risk stronger for covenants in gross than for covenants that burden other land, et cetera.

MR MILES QC:

Yes, I was too –

ELLEN FRANCE J:

I mean you do get a flavour.

MR MILES QC:

It does, I agree. I was a little too dismissive and that is helpful. It does give a nudge in the direction that they were thinking. I'd adopt it. It supports, in the big picture, it supports what we're saying.

GLAZEBROOK J:

What was the…

ELLEN FRANCE J:

Tab 7 and it's paragraph 7.55 to 7.57.

GLAZEBROOK J:

Yes.

MR MILES QC:

Could I just discuss briefly discretion? Actually, just before I do that, Your Honours, can I just take Your Honours to my friend's submissions really set out at para 7.11 dealing with quotes from Mr Comer and 7.12, quotes from our other expert, Mr Scrafton. Once again –

WILLIAM YOUNG J:

Can I just go back slightly to this Law Commission? They talk about covenants in gross although that's the focus of the attention.

MR MILES QC:

Yes.

WILLIAM YOUNG J:

And this isn't a covenant in gross?

MR MILES QC:

No.

WILLIAM YOUNG J:

Because there's a servient and a dominant tenement, to use old-fashioned language?

MR MILES QC:

I very quickly get out of my field of expertise when we get into covenants in gross. Your Honours, really at I suppose, yes, 7.12, 7.13, the basic point really I've been making there is that while my friend has made a series of propositions, and given you certain references, to the extent he still relies on them, I just would invite Your Honours to just check them out because the theme running through both their evidence, and that's what I was taking you to when I went to Comer's evidence a few minutes ago, is that while in theory the involvement of Synlait might be a factor, it simply there's still not, no one has enough knowledge at the time, at this stage to make any rational assessment of what actually might happen. And there's actually a very –

WINKELMANN CJ:

So the onus is on your client to show there's no, well to show there's no substantial detriment in releasing the covenant, but you say you've shown that sufficiently and shifted the burden to the respondents, is that what you're saying?

MR MILES QC:

I'm not saying so much it's shifting the burden, Your Honour, I'm simply saying –

WINKELMANN CJ:

The evidential burden.

MR MILES QC:

– that their attempts providing evidence just falls at the first stage because the so-called, well the opinions, particularly by their expert, are so speculative just on their own evidence, that its impossible to actually build any significant claim that the damage has reached a certain, you know, the appropriate level, or

that there's anything to be compensated for, and there is a sort of slight pattern running through those paragraphs of bald statements which are simply more nuanced when you go to the references in the cross-examination. But there's one of those which is actually just a straight mis-statement. If you go to page, sorry paragraph 7.12(c) where the proposition is Mr Scrafton did not think that the plant would be a determinative factor in the resource consent process, but acknowledged that it could be the silver bullet that prevents resource consent for a quarry. In fact he specifically said it wasn't the silver bullet.

If you go to 201.04747 under line 10: "Q. Do you accept that it would be easier to obtain resource consent and operate a quarry on the dominant land if a plant did not exist…? A. Again, I think that would be, the presence of a milk formula factory and the relevant sensitivity of it would be a factor amongst a number of others, again such as the sensitivity of the encroaching residential development that's occurred and probably, you know, as with the previous Winstone's consent, the issue of where any quarry trips would travel through the urban area, and would be matters of consideration. Again, I don't know enough about the sensitivity of a milk processing factory to suggest it could be the silver bullet. Q. But it could? A. Well, possibly, but I'm stating that without any knowledge of the operation or any sensitivity."

So far from conceding that it's a silver bullet, he's rejecting the proposition.

WILLIAM YOUNG J:
Sorry, are we looking at 117 of the Court of Appeal judgment?

MR MILES QC:
Well actually the Court of Appeal judgment got it right.

WILLIAM YOUNG J:
Yes.

MR MILES QC:

They get the quote right.

WILLIAM YOUNG J:

Yes, they have got the quote right.

MR MILES QC:

It's just the submissions that get it wrong.

WILLIAM YOUNG J:

Okay.

MR MILES QC:

Coming back then to just the last topic that I intended to discuss with Your Honours, the exercise of discretion, could we just stay with my friend's submissions, because there's a helpful series of statements there which are helpful because, we say, they're wrong. Now, at 9.2 my friend says, well, there are, "Three guiding principles that have influenced the Court in the exercise of its discretion," and what these three principles are in fact is just a re-statement of that proposition of Justice Ron Young which the Court of Appeal picked up at, what was it, paragraph 73, where it said that the guiding principles that we are following are the three propositions, and they are that the legislation isn't intended to free up the restrictions just to make it more enjoyable, secondly, the length of time between the covenant, yes, between the imposition of the covenant and the application and, finally, you can't permit contractual obligations to be swept aside unless there are strong grounds. Well, I don't accept for a moment that any of those are relevant principles on the issue discretion. I've already made it clear I don't think they're relevant principles at all, even on the substantive application. But the relevant principles for exercising the discretion seem to me to be relatively straightforward. The first is that if, having found in favour of an applicant, that any one or other of those grounds had been established then the discretion ought to be exercised in the applicant's favour, unless there is some serious

conduct that would make the granting of the application inappropriate or wrong.

Now it's difficult to see – well, let me go back. The only cases that are helpful on this are *North Holdings*, the recent judgment of Justice Gault in *Barfilon*, both of which judgments actually discuss the exercise of discretion, having found in favour of the applicant. Justice Katz says, "Well, the one thing, the one issue that concern me," she said, "is that it was the applicant was the party that actually designed if you, that signed the covenant in the first place five or six years earlier and agreed that the zoning would be whatever the zoning was then and is now, five years later, coming to the Court and saying, 'We want it modified.' But given," she said, "the rationale behind the change of zoning and why the applicant has brought the proceeding, I see no disentitling behaviour," and granted it. Justice Gault, discussing it really from about paragraphs 44 onwards, having found once again that the change of zoning amounted to, or the change of use and the change of zoning, was relevant, he says, "Well, I should look at the sanctity of contract, of course, I should look at the appropriation of private property."

Again, I have some doubts about the language there, as I've explained earlier this morning. But of course all that is saying is of course you've got to take into account the terms of the covenant. But, having decided that the covenant ought to be modified, the terms of the covenant would hardly seem to be relevant in how you exercise the discretion. Once again, at 50, he goes on about the sanctity of contract again and, again, AI have some doubts about that. But at 51 there is a comment which I do adopt, "There is however also no suggestion that the applicants have acted unlawfully or in a way that disentitles them to relief. They have simply taken the risk that relief would not be granted." Now the one criticism, I suppose, which my friend really relies on in the exercise of discretion, is that Synlait beat the gun. They went ahead and did some earthworks, they developed, began to do some of the sort of underpinning work, but essentially they did very little until the judgment, and when the judgment came out in their favour they went ahead and built the factory. And my friends are saying, "Well, essentially they're by acting in

breach of the covenant, that's acting unlawfully and in a way that should disentitle them to relief." It is not acting unlawfully, they were acting lawfully, they were complying with the zoning, doing exactly what the District Council said they were entitled to do. Of course they happened to be in breach of the private contract because they viewed it differently. They considered that that contract was one that was likely to be modified, and they're quite entitled to take that risk, in exactly the same way as Mr Ye was quite entitled to take the risk when he bought the land knowing full well the Synlait was building a factory, knowing full well that they'd applied to modify the covenant, and he took the risk that that in fact would be done, and both parties were quite entitled to take that risk, neither were acting unlawfully or improperly.

So I just finish this part of the argument by saying that I don't think we have found a case where a Court has said, "We would grant the application but in our discretion – because you've complied, you've satisfied us on one or other of the grounds – but we're not going to actually modify on the basis of the discretion we have because of your disentitling behaviour. The one – sorry, Ma'am.

WINKELMANN CJ:
I mean, on one argument they are, view, they are acting unlawfully because they're acting in breach of the covenant, aren't they?

MR MILES QC:
Oh, yes. But that's a private breach.

WINKELMANN CJ:
Yes, okay.

MR MILES QC:
That's just a breach of a contract. The one case where, which my friend relies on, is a judgment of Justice John Hansen in *Luxon*, a case down in Canterbury, where there was a disagreement amongst the locals out in the farming area just out of town, where there was a restriction on the use of the

land for, I don't know, any sort of mild commercial activity, and the applicant wanted to, built a wedding centre or something along those lines which certainly arguably was beyond the terms of the covenant. Now Justice Hansen rejected the application, he said there hadn't been a significant change in use because there was always intended there would be some sort of commercial use, there was no change of zoning from memory, it was just that the applicants decided that they just wanted to develop their property further. But when talking about the discretion he said it wasn't so much the breach of the covenant, he said, "But actually they breached a resource consent as well," and that's what actually led to his next comment which was, "That doesn't give me confidence that the party is going to abide any decision." So I can understand that where an applicant has acted unlawfully – and breaching a resource consent of course is unlawful behaviour – then the issue becomes more nuanced. But that is the extreme example that we can find of a discretion being exercised against the applicant. But of course he'd rejected it anyway because he said they hadn't complied with the grounds.

So I finish, Your Honour, with the suggestion that this Court should adopt not just the propositions that I've been advancing on this, but the sorts of considerations that Justice Katz and Justice Gault touched on in their judgments, that the exercise of discretion would only be exercised in circumstances of the sort that I was suggesting.

I think that covers all of the issues that I was planning to discuss with Your Honours. It leaves, I think, only the issue of costs and my junior is going to deal with that. Is there anything else at this stage, Your Honour, that you would wish me to cover?

WINKELMANN CJ:
No, I think that's very helpful, thanks, Mr Miles.

MS HAMBLETON:
As Mr Miles has foreshadowed I will address the Court briefly on Synlait's appeal of the Court of Appeal's decision in relation to costs. Our written

submissions are set out at paragraph 62 and I'm intending just to expand on those points briefly.

There are essentially two issues in relation to costs that I intend to address. The first issue is whether or not the Court of Appeal was correct to uphold the High Court's decision to grant indemnity costs under clause 7 of schedule 3 of the covenants and that clause essentially provides that the covenantor, which is now Synlait, must pay the covenantee's costs of enforcing the covenants, and the second issue is regardless of whether or not clause 7 applies whether costs should follow the event in the usual way.

So turning to the first issue, which is the effect of clause 7 of schedule 3, and if I could just take Your Honours back to the terms of the covenants, so if you could, it's at volume 301 and if I could take you to page 306. Now if Your Honours have that in front of you, so Mr Miles has already taken you through the schedule but I just want to draw your attention to clause 7 which is at the bottom of the page, and I'll just quickly run through what that says.

So clause 7 essentially provides that the covenantor shall pay its solicitors' legal costs and disbursements directly or indirectly attributable to the perusal, execution and registration of the deed and its covenants, and this is the important part, together with the covenantee's and/or the quarry occupiers and operators' solicitors' legal costs and disbursements directly or indirectly attributable to the enforcement of this deed and its covenants. Now this clause is identical across the two covenants.

The High Court awarded NZIPL indemnity costs under clause 7 notwithstanding that it was wholly unsuccessful in the High Court and on appeal the Court of Appeal upheld the High Court's decision and ordered that Stonehill pay NZIPL's costs on an indemnity basis. So we say that was an error and that costs in both the High Court and the Court of Appeal should follow the event and be party/party costs in the usual way.

There are two reasons for that. The first is that we say that clause 7 doesn't apply to an application brought under section 317 and, second, we say that clause 7 doesn't apply where a covenantee unsuccessfully opposes an application under section 317, and I'll expand on both of those points.

So on the first point, the Courts have long held that a party's entitlement to indemnity costs in a contract or deed must be plainly and unambiguously expressed, and the reason or the justification given to that approach is because there is an inherent improbability of one party to a contract agreeing to release the other from its liability otherwise arising at law. Both of those propositions I have some case authorities if Your Honours would like the citations for those?

GLAZEBROOK J:
You might as well give them to us.

MS HAMBLETON:
Okay. So for the first proposition, that it must be plainly and unambiguously expressed, the citation is *Newfoundworld Site 2 (Hotel) Limited v Air New Zealand Limited* [2018] NZCA 261, and that's a 2018 New Zealand Court of Appeal case at page 261, and the relevant paragraph number is paragraph 84, and that was a judgment actually delivered by Your Honour Justice Winkelmann. And for the second proposition, the inherent improbability, the relevant reference there is *Ailsa Craig Fishing Co Limited v Malvern Fishing Co Limited* [1983] 1 All ER 101, and that was at page 105 per Lord Fraser, and that was cited in a Supreme Court case, *Nalder & Biddle (Nelson) Limited v C & F Fishing Limited* [2006] NZSC 98, [2007] 1 NZLR 721 and that was 2006 New Zealand Supreme Court 1998 at paragraph 34.

So turning to clause 7, which you have in front of you, clause 7 provides for the costs of the covenantees' enforcement of the covenants, but it makes no reference to the costs of an application for the modification or extinguishment of covenant under section 317 –

WILLIAM YOUNG J:

Just pause. There never has been a claim on the covenant, I take it?

MS HAMBLETON:

Under the covenant?

WILLIAM YOUNG J:

Yes.

MS HAMBLETON:

There are no enforcement proceedings.

WILLIAM YOUNG J:

You issued proceedings by an originating motion – originating application, I mean.

MS HAMBLETON:

Yes.

WILLIAM YOUNG J:

Presumably it would have been open to cross-claim for an injunction?

MS HAMBLETON:

Yes, I believe section 316 actually allows for that possibility. I don't have the section in front of me but…

WILLIAM YOUNG J:

Okay, thank you.

MS HAMBLETON:

Section 316 contemplates that the two can go hand-in-hand or often occur in the same proceeding. So 316(2) provides that "An application may be made in a proceeding brought by that person for that purpose or in a proceeding brought by any person in relation to or in relation to land burdened by that

easement or covenant. So that leaves it open for a section 317 application to be made in an enforcement proceeding as well.

WILLIAM YOUNG J:
It's not quite answering my question. But in any event a separate proceeding seeking an injunction could have been commenced?

MS HAMBLETON:
Yes. So the point that I was –

ELLEN FRANCE J:
It's – sorry. No, you finish.

MS HAMBLETON:
The point that I was about to make is that the covenant, clause 7, does not expressly provide for the costs of an application under section 317. At the time that the covenants were created the relevant provision was the equivalent under the Property Law Act 1952 and there is no reference in the covenant to that. And we say that a defence of an application under section 317 is not an enforcement. So an application under section 317 is resolving the question of whether or not the terms of the covenant ought to be modified. Enforcement, on the other hand, means to compel observance, as the Court of Appeal found. It is a separate and quite different step and would include, for instance, as Your Honour has just mentioned, bringing an application for an injunction or damages for breach of covenant.

And Mr Miles already brought Your Honours' attention to a letter that was sent by the respondent's solicitors to Stonehill's solicitors in which it made reference to the two different steps and basically recognised that the two steps were quite separate. I don't intend to take Your Honours to that letter but I can give you the case on appeal reference if you wish to look at it.

WINKELMANN CJ:
Yes, if you give us the reference, thanks.

MS HAMBLETON:

The reference is volume 303 at page 1096. So back to the words of clause 7. So clause 7 also refers to the words "directly or indirectly". So it talks about the costs that are directly or indirectly attributable to enforcement and we say that the word "indirectly" also doesn't capture the costs of defending a section 317 application. Indirect costs must still be costs of enforcement, not costs of another process, and we say that an enforcement process is something quite separate to a section 317 application. Indirect costs of enforcement could include, just some examples, preparatory steps to an enforcement action, like sending a letter of demand.

As I mentioned before, often actions for the enforcement of a covenant and an application to extinguish or modify a covenant will often be combined and this was recognised or observed by the Court of Appeal. This is not such a case where the two are combined. Should NZIPL be successful in defending this appeal it would still need to issue new proceedings if it wished to compel observance with the terms of the covenants, and just one further point that I will make on this is that a section 317 application can be brought in circumstances where there is no breach of covenant, so a section 317 case is not necessarily a step on the way to enforcement.

So for all of those reasons just mentioned, we say that win or lose the High Court's and Court of Appeal's decision to award indemnity costs ought to be overturned. Even if enforcement does include the costs incurred in defending a section 317 application, so if we're wrong on that, we say that the clause does not apply if Synlait's succeeds in this appeal. It is implicit in the use of the word "enforcement" that the enforcement must be successful. An unsuccessful attempt to enforce a covenant is not enforcement. It's actually quite the opposite. It's a failure to enforce.

Clause 7 does not expressly provide that it applies to costs incurred in relation to a failed or attempted enforcement action and nor should it be interpreted as doing so. There is nothing in the words used that suggests that it was the parties' intention that the covenantee would be entitled to a full indemnity for

their costs of unsuccessful enforcement and therefore unjustified enforcement actions. To do so would be to essentially give the covenantee a blank cheque to bring a frivolous or unmeritorious action.

So turning to the second issue that I raised at the beginning which is whether or not, regardless of whether or not clause 7 applies, costs ought to follow the event. So we have two points to make on this. The first is that we say that even if clause 7 were to apply and you could read into the words of clause 7, which we say you can't, that it applies also to a failed enforcement action or an unsuccessful defence of a section 317 application, we say that there are public policy reasons not to order that Synlait pay NZIPL's costs on indemnity basis in this appeal and that costs should follow the event in the usual way, and the reason for that is that parties should not be immune from the cost consequences of pursuing an unsuccessful case. To allow an unsuccessful party to recover indemnity costs, particularly on appeal, would encourage the indemnified party to take an unmeritorious position in the knowledge that they were protected from cost consequences all the way through to the Supreme Court.

WILLIAM YOUNG J:
Heads I win, tails you lose.

MS HAMBLETON:
Yes.

WINKELMANN CJ:
That's a point against you, I think.

WILLIAM YOUNG J:
No, point is to – no, I think it's a point in your favour.

WINKELMANN CJ:
Is it? What about the fact that the respondents are supporting their legal rights, so…

MS HAMBLETON:

Yes, I'm coming to that, Your Honour. But before I get to that point I just had one further point to make on that, that there is a long-standing principle that, unless there are exceptional reasons, costs ought to follow the event and that is that it's the loser and only the loser who pays, and there's relevant case authority from the Supreme Court in *Shirley v Wairarapa District Health Board* and the citation for that is [2006] NZSC 63 and the relevant paragraph number is paragraph 19.

So we say that there are no exceptional reasons in this case that would justify a departure from the usual approach. There have been some decisions of the Courts in first instance that have held that the principle that costs follow the event doesn't actually apply in applications under section 317, and as Your Honours foreshadowed, the reason for that the Courts have articulated is because they say that a party is entitled to defend its present legal right.

In particular, there are two High Court cases, both of which Mr Miles referred to through his submissions, in which the Courts referred to an application under section 317 as akin to seeking an indulgence. Those two cases are the *North Holdings* case and *Pollard v Williams*, so the judgments of Justice Katz and Justice Cooke.

We say that that approach is not correct. There's nothing particularly special about an application under section 317 that would warrant a departure from the usual cost principles. An application under section 317 we say is not an indulgence. It is similar to any other statutory right to apply to the Court for relief and the usual cost principles ought to apply.

So it's for all of those reasons that we submit that if Synlait is successful in this appeal the respondents should pay Synlait's costs in this Court and Stonehill's costs in the High Court and Court of Appeal, and if Synlait is not successful in this appeal, for the reasons that I have given that clause 7 doesn't apply, this Court should overturn the High Court's and Court of

Appeal's decision to order indemnity costs and the usual measures should apply.

That's all I intended to…

WINKELMANN CJ:
Now, are there some procedural bits and pieces or is no one going to address us on that in relation to the parties who are and aren't before us?

MS HAMBLETON:
I'll just confer with Mr Miles. Your Honours, I'll address you briefly just on that procedural point. So there is a procedural issue which we covered in our written submissions at paragraphs 59 through to 61 about the land which is called the Grander land throughout the submissions but is now owned, as Mr Miles mentioned earlier, now owned by Hynds Foundation. So we understand that Stuart PC Limited and Hynds Foundation intend to file a memorandum with the Court, whether it's either later this afternoon or early tomorrow, confirming that they consent to the covenants being modified or extinguished. Those are my submissions.

WINKELMANN CJ:
Thank you.

WINKELMANN CJ:
Mr Galbraith.

MR GALBRAITH QC:
Thank you, Your Honour. If I could just go back to some of the facts to perhaps help the Court a little bit more. Unfortunately the maps and plans and photos are scattered through the various bundles –

WINKELMANN CJ:
It would be quite helpful if someone could put on a piece of paper where we can find the different ones and what they are.

MR GALBRAITH QC:

Yes, we'll do that.

WINKELMANN CJ:

Thank you.

MR GALBRAITH QC:

Because in fact my learned friend did that for me because I was struggling in the same way. But could I first go to what I hope – and I don't know whether to call it a map or a plan or what it is – that's annexed to our submissions, well, I hope it's annexed to our submissions. And the reason for going there –

GLAZEBROOK J:

Sorry, could you – I'm afraid I've buried your submissions somewhere so if you could just wait a second? Not on purpose, I assure you.

MR GALBRAITH QC:

I can understand. We have got some copies, if we're allowed to hand those up any more?

WILLIAM YOUNG J:

That would be helpful, thank you. I think mine have fallen off.

MR GALBRAITH QC:

Thank you, Your Honour. You'll see one of the particular reasons that I just want to draw the Court's attention to, you'll see right in the middle of the, I guess, photograph which has been added to, the NZIPL land, the 84 and a half hectares, and the location of basalt resource. So that you heard much about the 150-odd hectares that originally had the benefit of the covenants. But the other 70-odd don't contain the basalt resource and my friend very properly said that that larger area would be used for things like over-burden, et cetera. But the basalt resource is around in that slightly u-shaped area there on the NZIPL land.

The Synlait land is straight in front of that, as you can. There's the two – it's been divided by the yellow lines but the Synlait land is 28-odd hectares, some of which lies within the area where the factory has been developed and the land which is burdened land and some of which lies outside that, and perhaps just note there the identification of a high care zone and I'll explain that in a moment.

If you look to the left – I'm sorry, I'm better with left and right rather than north, south, east, west – so if you look to the left, looking at the photograph, you'll see this land described as the Rainbow Water land, which is also hatched. That is also land which is subject to similar covenants to those which are over the seven-odd hectares of the Synlait land. The Rainbow Water land applied for industrial zoning when the –

GLAZEBROOK J:
Does that include the paragraph 1?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
So it is similar?

MR GALBRAITH QC:
The 'Bow Water, yes, sorry. That land applied for industrial zoning at the same time as the Synlait land got zoned industrial. It was opposed on the ground of the covenants and Council decided for the protection of the quarry that it would not be rezoned as industrial, so that remains zoned in a rural zoning. I'm not entirely sure which rural zoning but certainly a rural zoned and it wasn't zoned in 2012 for industrial. You then see the other –

WINKELMANN CJ:
So who opposed that zoning at the time?

MR GALBRAITH QC:

I'm sorry?

WINKELMANN CJ:

Who opposed that zoning for Rainbow Water because –

MR GALBRAITH QC:

I think, well, Winstone among others but I think a number of these but certainly Winstone opposed that.

WINKELMANN CJ:

Did they oppose the rezoning of the Synlait land?

MR GALBRAITH QC:

No, they didn't oppose the rezoning of the Synlait land. They in fact owned the Synlait land at that time.

WINKELMANN CJ:

And they supported it? They promoted it?

MR GALBRAITH QC:

When I say "they", Winstone.

WINKELMANN CJ:

They promoted it then?

MR GALBRAITH QC:

I'm not – well, I think it was a consortium that promoted it. I don't know the details of it, Your Honour. It was before my time. Winstone by that stage was no longer Winstone, of course. It had got bought by Brierley somewhere around about the 2000s and then ended up in Fletchers and then got disaggregated by Fletchers, so what happened to Winstone's in the years when I first knew them and when I was in law, it's not a steady history.

You can again see there in that photograph the Graham block, the proposed Winston plant which, at least when I drove out there the other day, didn't seem to have anything built on it yet. The Yashili –

O'REGAN J:
That's not the same Winstone, is it? That's Winston.

MR GALBRAITH QC:
No, it's a different Winston, Sir. It's Winston Nutritionals which is a different Winston. And the Yashili plant which you see there which has been built for some years and you'll see also there that little round red dot saying, "High care zone," and then there's the Stuart PC land as you go up to the right which is where the pipe, concrete pipe plant is, and the Grander land which my learned friend was just talking about. I'll be taking –

GLAZEBROOK J:
The Grander land is now, remind me because I…

MR GALBRAITH QC:
It's now Hynds Foundation, I think it's called, but nothing has happened on it to the best of my knowledge.

McDonald Road is that little bit of road you can see just between Yashili and where the Synlait yellow and hatched area is. It just comes to a dead end just past the top of Yashili, and it was, as my learned friend also quite correctly said, was formed from part of a surrender of the original burdened land, the nine odd hectares. A small part of that was surrendered to form McDonald Road.

GLAZEBROOK J:
And you say it comes to a dead end?

MR GALBRAITH QC:

It comes to a dead end at the moment, yes. The two high care zones, just to talk a little bit about infant milk factories, what they are, of course, effectively they're factories which dry the milk into a powder form and so they have big air dryers and they have to suck air in to effect the drying process, and the evidence which I'll take you to the affidavit of the former manager and the person who was there at the time the Yashili plant was developed, the Yashili plant was specifically designed to place its high care zone which is where they suck the air in and goes into the dryers which could risk contamination, it was specifically designed to be as far as away as possible in their building from the possibility of the quarry being developed. Now at the time Winstone's had given up on the idea of the quarry and were selling but Yashili took care because the quarry land was still zoned for aggregate extraction, took care to design their plant so that the inlets for the air for the dryers was placed as far away from the potential quarry zone as possible with the inlets not catching the prevailing winds, and the manager says and compares that with the Synlait building which has its high-carer zone close to the, or closer, by a significant amount, a couple of hundred yards at least, to the prospective quarry zone and facing the prevailing winds. So there is on the evidence a significant distinction, much more than was conceded by counsel in submission between the two sites and the two buildings. What the former manager of the Yashili says is that the big area which you can see there, that's not where the driers are, that's where they've got their storage, et cetera, the warehousing effectively. So they put a big chunk of warehousing between themselves and the potential of the problem coming from a quarry developed in due course.

Now I'm sorry to do this to Your Honours, but I do want to take you to a couple of other. If Your Honours wouldn't mind going to 303 in the exhibits? As I say, there's a scattering of plans and photographs, et cetera, through all the exhibits, but I just want to take you to a couple of the Babbage plans which accompanied the resource consent by Synlait we referred in our submissions to –

WINKELMANN CJ:
You said “Synlait”?

MR GALBRAITH QC:
By Synlait’s resource –

WINKELMANN CJ:
Is it said properly, “Synlait”? I’ve been saying “Synlait”.

MR GALBRAITH QC:
That’s probably more French than I’ve been using, Your Honour. But in any event you’ll see if we go across to 303.0979, it just gives you an idea of the topography of this land. Because if you look at the flat photograph it just looks like, well, they’re all just all flat and you just walk from one to the other. So, 303.0979 gives you the steepness gradients, and you can see McDonald Road there, you can see that white area is the Yashili plant, and then there’s the site where Synlait was seeking consent, Lot 1. And you’ll see that the area where Synlait has built the factory, very sensibly, is the flat area with the big gaps between the gradient measure and the area coming closer to the NZIPL site gets steeper and steeper and steepens past the boundary, gets even steeper, and that runs right around that side of the Synlait site. So you’ve got a site which is flat down where the factory’s been built and a little bit flat to the right-hand side of that and after that it starts going up in the air very significantly.

If you go across to the next page, 980, you’ll see the, for the resource consent, the layout of the site which is proposed there by Babbage, and this is part of a suite of plans that was consented. And if you go across to 985 you’ll see that again with again the severe gradients between the site and the quarry area and you’ll see on the right-hand side of the Synlait site stormwater ponds. So Mr Clement when he made his affidavit talked about Synlait intending to develop much of the site, and there’s not much more of the site that can be developed, there certainly is a little bit of spare area to the right

towards the stormwater pond, but you're not going to be developing that site going up those gradients at all, there is no likelihood of that.

Can I then take you, unfortunately could we go to 304 just for a moment, just for one photograph, then we'll have to go to 305, I'm sorry. In 304, if Your Honours wouldn't mind going to 1256, it just gives the outline on the servient land, the outline of the covenanted area with the outline of the factory shown beneath it, so that you can see that most of the factory, virtually the whole of the factory, falls within the covenanted area, and you can see again just down towards the bottom where the basalt resource is in Lot 3. There is some hint in perhaps the submissions in evidence that the factory could have been put outside the covenanted area. With great respect, having seen those gradients and that, I don't think that would have been a possible runner, and obviously it makes a lot more sense to have it by McDonald Road because you need access.

And if Your Honours wouldn't mind just going to 305 for a moment, and this is relevant to the proposition that not much had happened prior to the High Court judgment. If we go to 305.1520, these are dated photographs. The first one at 1520 is 15th of July 2018, the High Court judgment November 2018, you can see the crane in the background. And if you go across to 1521, this is August 2018, you can see that's more activity than the suggestion, "A little bit of excavation going on," that's the site, and that actually gives you a perspective of looking down from the gradient of the hill in front of the site. And then September, the next one, 1522, a little bit more than just turning a few sods of earth at this stage, September 2018. October 2014, that's 1523, and again you get a good perspective of the hill, a long way up in the air on the hill, and those are the only photographs we've got prior to the November judgment. But it is incorrect to suggest that Synlait were holding back and have done only a modicum of earthworks prior to obtaining the judgment they got from Justice Woolford. They had gone full bore, despite the requests from the respondents to pause and try and sort things out.

Now perhaps a little bit of a general discussion or submission, sorry, about the overview of the position. The first thing is that these are decisions to be made on the facts, one has to look at the facts quite carefully to determine whether the 317 application should be granted or not. And the onus on the facts, and the law, lies on the applicant, and of course the onus on an appeal against discretion, which is what the Court of Appeal judgment is, also lies on the appellant. So in a sense there are –

GLAZEBROOK J:

Is it a discretion in a *May v May* sense, is that the submission, that it's a discretion in a *May v May* sense rather than an evaluative judgment?

MR GALBRAITH QC:

It's, May or May obviously based on evaluation, Your Honour, because you've got to – when I say "you", I'm sorry – but the Court has to look at the grounds under 317. But it's been long-held it's a discretion that is exercised and that goes back to –

GLAZEBROOK J:

Well, you might have to convince me of that.

MR GALBRAITH QC:

All right, well, we'll have a look at the effect if we have to.

WINKELMANN CJ:

I must say, I'm not seeing it that way either.

MR GALBRAITH QC:

Well…

WINKELMANN CJ:

Your case doesn't turn or fall on that though?

MR GALBRAITH QC:

No, it's not going to stand or fall on that, Your Honour, so I don't want to get into that debate really. But I think with or without discretion it's a matter on which the appellant does have an onus or a burden to persuade the Court that the change or changes have a causal effect, in our submission, on the purpose of the covenants so that in exercising the discretion the Court ought, which is, of course, the words in the first ground of the 317, ought to deny or modify a proprietary interest which otherwise exists and is either registered or is notified on a title register.

Now again there's no argument that the applicant, who's now the appellant, well knew about the existence of the covenants. They were on the title. It was a term of the agreement which they entered, or, sorry, which Synlait entered into with Stonehill that the agreement was conditional upon Stonehill succeeding in removing the covenants, but despite that, and there was also a provision in that agreement which allowed Synlait to take possession earlier than settlement. So as you can see from those photographs long before the covenants got removed by Justice Woolford's judgment in November Synlait had gone into possession and was building as fast as it could.

With greatest respect to what was said by counsel, there's no evidence that I'm aware of that Mr Ye had any indication at the time that he purchased that Synlait were proposing to do what they very shortly set about doing. Instead if we look at the evidence, the actual evidence, if we look at his evidence which will be in 30 – his first affidavit. Sorry, I just need to find which volume it's in. I think it's in 301, his first affidavit. 201, sorry, 201 for the evidence, behind tab 32, and I will be coming back to the evidence because, in my submission, because the facts are important it's important to have a look at the evidence. So what he knew was in paragraph 14, that's at page 130, "On 7 May, my solicitor Kevin Lo, director of Mana Law, received an email containing dialogue between Stonehill and Havelock regarding the covenants. However, as the directors of Havelock and I were travelling overseas, our solicitors replied to Stonehill stating that we would not be able to decide on the

removal or retention of covenants before we had a better understanding of the situation," and then that Mr Lo's email is in the bundle.

Then, "On 1 June 2018, I met with Mr Peter Bishop of Stonehill in the hope of better understanding the situation. During the meeting, Mr Bishop mentioned his plan to go to Court to remove the covenants. At this meeting I strongly suggested to him to allow more time for us to consult with experts and consultants. At that time, I also raised my concern about the possible breach of the covenant through the commencement of the earthworks on the servient land. I suggested that Mr Bishop temporarily cease all activities that may be considered a breach," and then wrote the letter on the 19th of June.

O'REGAN J:
Doesn't that show he did know that?

MR GALBRAITH QC:
I'm sorry?

O'REGAN J:
Doesn't that show he did know if he's concerned about –

MR GALBRAITH QC:
He did know that there was an – he received an approach from Stonehill's to remove the covenants. He didn't know, at least as I understand that, what Synlait was proposing at that stage on the site.

O'REGAN J:
They knew someone was doing – he knew someone was doing some preparatory work for a building?

MR GALBRAITH QC:
Yes, well, he'd seen that as Your Honour can see. And as Mr Broadmore reminds me, the agreement for sale and purchase was actually the 2nd of May so no, he didn't have even that knowledge at the time the agreement was

dated, but certainly the suggestion that he knew all about it and in some way is compromised by that isn't established on the evidence.

WILLIAM YOUNG J:

I'm sure you're right but just so I understand it, Synlait bought the land in February 2018?

MR GALBRAITH QC:

They signed to buy the land subject to removing the covenants, yes.

WILLIAM YOUNG J:

Yes, sorry, and the resource consent was applied for and obtained?

MR GALBRAITH QC:

I think in March, Sir.

WILLIAM YOUNG J:

Was there no notification?

MR GALBRAITH QC:

No, it was non-notified. He wouldn't have got it in any case, Sir.

WILLIAM YOUNG J:

No.

MR GALBRAITH QC:

The previous owner would have got it.

WILLIAM YOUNG J:

And was there a press release?

MR GALBRAITH QC:

I have no idea.

WILLIAM YOUNG J:

It may not be until – the Synlait media release is dated 27 February and 20 June 2018. 20 June 2018 is late but 27 February would have been…

MR GALBRAITH QC:

That's when they signed, Sir, yes, and there had been, there was an approach by – I'll take you to Mr Harris' affidavit, it's not Mr Matthews, Mr Harris, who was the prior owner, the owner who sold to Mr Ye. I wasn't planning on taking you there now but he did receive an approach from Mr Bishop, who was a principal of Stonehill, earlier than that and told Mr Bishop that he would not agree to modify or remove the covenants, that he believed in the importance of the basalt resource and was focused on protecting that. So the sign was there right from the very start that the basalt resource wasn't going, or the owners of that, weren't going to disappear quietly.

And what is said, of course, by Mr Clement in his affidavit, that Synlait went ahead and used the term in good faith which is different use of the term that I'm used to given that they knew that what they were doing was in breach of the covenant and they knew that the former owner, or at least Mr Bishop certainly did, and they knew once Mr Ye knew about it that he wasn't happy with what was being done either so…

O'REGAN J:

He didn't do anything to stop them?

MR GALBRAITH QC:

He wrote.

O'REGAN J:

Yes, but he didn't seek an injunction or something like that?

MR GALBRAITH QC:

Well, unsurprisingly, Sir, because you have to support an injunction with an undertaking as to damages and you're going to be – so somebody takes

advantage of you who's got might on their side and you're meant to go and seek an injunction and put up an undertaking as to damages on something where, on my learned friend's view of 317, can simply be put aside simply because there's a zoning change, it would be a very unwise thing to do.

WILLIAM YOUNG J:
I'm not sure what the position is about this but it would have been possible, I imagine, for him to have sought only a permanent injunction.

MR GALBRAITH QC:
It would have been possible, yes.

WILLIAM YOUNG J:
And not sought an interim injunction although I have a feeling that that might be a practice that's been frowned on. I'm not sure.

MR GALBRAITH QC:
You don't see it very often, Sir. I mean it's one way of avoiding the undertaking as to damages, I agree with that. The problem you then have though is you get to the end of the road and there's a great big factory built and the chance of the Court then removing it is probably fairly slight.

WILLIAM YOUNG J:
But it would at least – yes, okay. It would, however, be an unequivocal enforcement of the attempt to enforce the covenant.

MR GALBRAITH QC:
It would be. There's no argument about that, but one might hope that the parties would observe whatever their legal rights are at a given time. 317 allows for an application and that would be the normal thing to do. You make an application, find out whether you're right or wrong and then proceed on that basis. That isn't what happened here.

So as Your Honours are aware, the applicant or the appellant relies on a long, fairly repetitive list of changes but what seemed to me, at least in this respect, it all boiled down at the end of the day to the fact that the zoning had changed and that seemed to be the core issue which was identified as justifying this modification to the covenants. Now I wasn't intending to discuss that this early but I'm now going to say a few things about that because it does seem –

WINKELMANN CJ:
I think it's a broader proposition than that. For one, it includes the whole neighbourhood changing, so the whole area has changed.

MR GALBRAITH QC:
I'm not quite sure what's meant by that. I mean there have been changes in the area, yes, Your Honour, and I've got to deal with that.

WINKELMANN CJ:
So it's an industrial park?

MR GALBRAITH QC:
It's an industrial park, yes. That's what Stonehill developed there.

But can I just talk about zoning for a moment and I do want to go back to an old case, and I'm sorry to go back to an old case because my learned friend would say, well, they're all irrelevant, but it's perhaps useful to know what the law was at least before this Court's asked to change it. But zoning isn't a change of use, never has been, zoning is simply –

WINKELMANN CJ:
You mean for the purposes of (a)?

MR GALBRAITH QC:
Just, zoning is not a change of use, full stop. Zoning is simply zoning, it doesn't change anything. If somebody then does something in accordance with the zoning, that's a change of use, but…

WINKELMANN CJ:

Yes, but in terms of the statute we're concerned not just as changes of use but also of changes of what is a reasonable use, so…

MR GALBRAITH QC:

Well, a reasonable use is the use that is then, the land is put to. But zoning itself isn't a change of use at all. I mean, the fact there is zoning may mean that there's a prospect of a future change of use, yes, that's quite correct, but it's under (b), not under (a), as my learned friend tried to say. But zoning itself is not a change of use, has never been recognised as a change of use, it's what it is, it's a planning change, and we've included in our bundle of documents an English Supreme Court, UK Supreme Court case, and if one looks at that you'll see Lord Sumption very clearly saying planning changes aren't changes of use. Planning changes, he also says, don't affect restrictive covenants, that's not the purpose of them, planning changes are for the purpose of planning. And what the evidence was is that covenants don't get identified when planning changes are being made, they're in a separate box. But they're not, with great respect, simply in the box that my learned friend tried to suggest, which was that they're simply private agreements and therefore to some extent don't seem to count so much.

Restrictive covenants have been around for a long time. Of course there's always the difficulties in the law about positive covenants and covenants in gross, which the Law Commission were later referring to when they introduced subparagraphs (e) and (f). But restrictive covenants associated with land have got a long, long history and recognition in the law and in the statute. They're in the Property Law Act, they're in the Land Transfer Act, they're registerable in some forms, they're notifiable in other forms, and the reason that they are is because they create proprietary interests, they can be subject to indefeasibility principles. They're not something, with great respect, that's just a private contract that can be quite so readily swept aside as my learned friend was suggesting, and certainly not swept aside simply because there's a zoning change. Because most, many, if not most restrictive covenants are intended to operate either contrary to zoning or to restrict the

zoning or to restrict the impact of new zoning. And restrictive covenants come in all shapes and forms, but that's one of the primary purposes of restrictive covenants.

WINKELMANN CJ:
Well, I mean, I'm not sure that – it may just be words but, to use your own language against you, zoning's got nothing to do with use, and restrictive covenants are primarily concerned to restrict use of land.

MR GALBRAITH QC:
That's right.

WINKELMANN CJ:
Not zoning of land.

MR GALBRAITH QC:
No. But, Your Honour, what that means is that restrictive covenants are very generally inconsistent with zoning. So that's why I say they are, zoning doesn't have a direct impact on restrictive covenants. Use, yes, may have, and of course (a) is if there's been a change of use, which we'll have to deal with. But zoning, which is the emphasis of the appellant's case, very often will be inconsistent with the purpose of the restricted covenant. That's why you have a restrictive covenant so that whatever the restriction is it doesn't get swept away by some zoning change.

And if I could just go back to an old case, and it's a simple case, but in my respectful submission I at least found it helpful and it does, in my submission, illustrate a couple of those basic points. And it's a case of *Jansen v Mansor* (1995) 3 NZ ConvC 192, 111 at 192, 115 (CA), and I'm now going to struggle to tell Your Honours which volume it's in…

WINKELMANN CJ:
Tab 3 of your authorities.

MR GALBRAITH QC:

Great, thank you very much, Your Honour. Yes, the further authorities, I think. As I say, it's an old case but was what I might describe as a strong Court and my learned friend is relying upon Justice Francis Cooke's judgment and this happens to be a judgment in which the then-President, his father was one of the three Judges.

Now it's a simple case but in my respectful submission it kind of indicates what 317 is about. It was a case where there was a covenant which was noted on a title of some bare land back in 1958 and what it said was on the property which was bound by the covenant you could only put one storey or nothing above 25 feet in height, maximum overall height of 25 feet, and what happened was that there was then a block of five one-storey apartments built on the servient land and the appellant wanted to go up and build a second storey and off it went to Court and there was Justice Barker, I think, granted an interim injunction on it and then it came up in appeal and went to Justice Temm first of all who refused the application and then came up in appeal, and if we go across to page 16, that's 16 at the bottom right, the numbering from the bundle, there was an argument that there was only one restriction, that the 25 feet was the only certain protection, and the Court you'll see on the right-hand column on that page, second full paragraph down, didn't accept that argument. "We don't accept the argument. The covenant clearly contains two elements, and both must be considered. If the covenant had been limited to requiring a single storey building, it would have given the respondents substantial protection, even if the extent of that protection could not be defined in terms of height. The respondents would be at risk of a high single storey building, such as an A-frame, but in the ordinary course could expect single storey buildings to be of limited height," et cetera, et cetera. So there's a dual protection, the Court says.

At the foot of the page, because one of the issues, and this goes back to this question about discretion that's been put to me, the last paragraph on that page, "No doubt one could approach the application of the section by the two step process suggested, but the real question in para (a) is whether, by

reason of any change of the kind mentioned, the covenant should be modified. The focus is not on the fact of the change, but rather on its impact from the point of view of making it appropriate to modify the covenant. It is unhelpful to consider the existence of a change separately from the context as part of composite test which the section provides." And next line, "Both pieces of land were vacant at the time of the creation of the restriction, but the restriction was clearly entered into in contemplation of residential buildings," so they didn't have buildings there when they did. "No doubt in 1958 single unit dwellings were in contemplation rather than the five unit block of flats subsequently erected….We agree with the Judge, however, that is not a change in user which in any way suggests the covenant should be modified."

And then if we go across the – they then have a discussion about, well, what would make these covenants ineffectual and therefore justifying a change, and they were saying if on some other land there'd been a row of high rise buildings would cut the view out, well, then the covenant would have no purpose. That's what they're saying at the foot of the page and across the top of the next page.

Then half way down page 17, the right-hand column, "Paragraph (b) of subsection (i)," so we're now in the one about future, et cetera, "enables the Court to make an order where the continued existence of the covenant would impede the reasonable user of the land in a different manner or to a different extent from that which could have been reasonably foreseen by the original parties at the time of its creation. We accept that the addition of the further storey would in itself be a reasonable user of the land if permitted by the building and town planning laws. It is inherent in a restrictive covenant that what is restricted is something that would otherwise be lawful. What is restricted in this case by the requirement to build only a single storey is in no way different from what was contemplated when those words were put in the covenant in 1958," in other words, single storey, and the fact that reasonable user might be two storeys, three storeys, or the planning might put a skyscraper up, is not relevant. What is relevant is the restriction that was imposed by the covenant. Is the purpose of that restriction still capable of

being performed? Yes, and so little (a) or little (b) don't apply, and the point made, of course, that reasonable user will always be lawful but that's not the issue.

So that at least was the law as I think it's –

GLAZEBROOK J:
So the flats went up because of the zoning change, is that why you're showing us this, or…

MR GALBRAITH QC:
No, not because of the zoning change. But the point of what we were just looking at, Your Honour, was the fact of a zoning change and the fact that it might be lawful in accordance with the planning laws to put two storeys up doesn't mean that the purpose of the covenant has been lost and that section –

GLAZEBROOK J:
But had there been a change here or have you always been allowed two storeys? Because if that had been a change then you can understand what they're saying but…

MR GALBRAITH QC:
Well, you'll remember that they –

GLAZEBROOK J:
I know there'd been a change to the neighbourhood, and in fact to a lot of people chagrin in that horrible five-storey thing they've got down there.

MR GALBRAITH QC:
Well, we had those sausage developments as you, well, I remember but probably Your Honour's too young, but I remember those.

But the point there was that at the time it was bare land and at the time, as they said in ’58, probably nobody envisaged even the five one-storey units. So the fact that it became lawful subsequently to, and obviously was lawful or she wouldn't have been able to put a second storey on, that's doesn’t change the purpose of the covenant, which was to restrict it to one storey.

And so when one leaps forward, if we can, to Justice Cooke the, Justice Francis Cooke – I was going to say “the Younger” but…

GLAZEBROOK J:
I just still don’t know, because in terms of Justice Katz’ I think it is, three-pronged, was what they want to do lawful under the previous law, is it? This case doesn’t stand for any of that then?

MR GALBRAITH QC:
This case is completely the opposite of that, and this case says that it’s covenant, you start with the covenant and you look to see the advantage, the disadvantage under the covenant, and has that changed, not simply would it be reasonable for somebody to build two storeys. Because it will always be reasonable for somebody to build storeys if the planning law allow that.

GLAZEBROOK J:
But if you weren’t allowed at the time the covenant was put in place and then allowed later…

WINKELMANN CJ:
Right, yes.

GLAZEBROOK J:
But that isn’t this case, that's what you're saying?

MR GALBRAITH QC:

Well, no, I'm saying that that certainly has been the received wisdom about what the law is that you'll find in *Hinde, McMorland*, et cetera, et cetera, that that case is not in my submission –

GLAZEBROOK J:

So this is just on a totally different point then?

MR GALBRAITH QC:

Oh, yes, it is – well, it's on the point of what (b) means.

GLAZEBROOK J:

All right, thank you.

WINKELMANN CJ:

Right. So we're going to adjourn now for the evening.

MR GALBRAITH QC:

Oh, sorry, right.

WINKELMANN CJ:

We'll come back to this point tomorrow, Mr Galbraith.

MR GALBRAITH QC:

Thank you.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON THURSDAY 4 JUNE 2020 AT 10.01 AM

WINKELMANN CJ:
Mōrena Mr Galbraith.

MR GALBRAITH QC:
Good morning Your Honour. Just before I get back to where I was, can I just think correct something in that map that my learned friend provided at the start. You might remember this map which had the various zones on it. It looked like a Waikato District Council map. It is and it isn't. It's fundamentally, the underlying part is a Waikato District Council map, but the key it seems on the right-hand side, the coloured key must have been added because, for example, if one looks at the green it talks about approximation of original benefited land, and I'm sure that's not a Waikato District Council –

WINKELMANN CJ:
No, we can assume it's not.

MR GALBRAITH QC:
So the slight problem is if one looks at, if you wouldn't mind, exhibit, volume 303.1119, that is a Waikato District Council map which hasn't been modified.

GLAZEBROOK J:
Sorry, I've got the wrong one.

WINKELMANN CJ:
No you've got it, it's right at the back. It's 303.1119.

WILLIAM YOUNG J:
I go from 1118 to 1120.

MR GALBRAITH QC:

Oh dear. Well Your Honour won't have it I'm afraid. I'll just explain what it is Your Honour. I don't think it will be controversial. It's a Waikato District Council planning map. At the bottom foot it's dated the 4th of July 2018 and you'll see it sets out zoning. Now the difference between that map and the orange line, which has apparently been drawn onto the map which was produced, and the orange line is said to be the boundary of residential 2. Now that doesn't match with the Waikato District Council map which shows at least three of those, or two and a half of those lots, as being rural not as residential. For example, the Graham block is split in two. It's –

GLAZEBROOK J:

I'm having some difficulty mapping the two together.

MR GALBRAITH QC:

Yes. They don't –

WILLIAM YOUNG J:

They're differently orientated.

WINKELMANN CJ:

So it's on the left-hand side.

MR GALBRAITH QC:

On the left-hand side of the big one and the little one.

WINKELMANN CJ:

So that orange line, which is at the bottom left-hand corner, should be lifted up –

MR GALBRAITH QC:

Goes around –

WINKELMANN CJ:

– a bit in that block there?

MR GALBRAITH QC:

Yes, you'll see the Graham block is on the actual Waikato District Council map on the left-hand side towards the top of it you'll see there's an orange area, which is the Graham block, or part of the Graham block, which is residential 2, but there's part of the Graham block, which you'll see in the yellowy, or whatever you call it, it's not yellow but I'm not good on colours, browny colour, which is actually part of the Graham block, which is still rural, but that's been captured in the orange line which is run around in –

WINKELMANN CJ:

Is that the only mistake?

MR GALBRAITH QC:

No, that's not the only one because the bigger, if you go slightly to the right, the bigger –

O'REGAN J:

Which?

MR GALBRAITH QC:

The much bigger block there is rural still, but that's encapsulated within the orange line here, and similarly the longer bigger block is actually the Rainbow Water block which we know is rural, and that wasn't captured within the line here correctly, wasn't captured, and there's a smaller other deviation up to the right too.

WINKELMANN CJ:

So the orange line just comes down a little bit too far?

MR GALBRAITH QC:

It comes too far, and it doesn't change anything because no witness, no expert witness said that the presence of some residential 2 land, zoned as it was in, this was a planning change, planning change 21 in May 2018, none of the expert witnesses suggested that the presence of this residential 2 land

affected the ability of NZIPL to get a consent for the development of the quarry. Which brings me back to where I was yesterday, is that it's all very well to talk about changes, but the only changes which are relevant are changes which have a causative impact on the covenant. If there's simply a change in the area, and it doesn't have some causative impact on the covenant, it's a change but it's completely irrelevant, and so –

O'REGAN J:
What do you mean by a "causative"…

MR GALBRAITH QC:
Well, Your Honour, for example, if this residential 2 zoning meant that the witness said, well there's no chance at all that the quarry is going to get consent, then obviously that has a causative effect on the covenant, and so then the Court can say, well no point in the covenant anymore, or we should modify it or whatever else. So that's what I mean by "causative". It's got to have some consequence that's relevant to the purpose of the covenant, the covenant itself.

GLAZEBROOK J:
And would you accept it's a consequence both on the benefited land and/or the burdened land?

MR GALBRAITH QC:
Well it could be. Again it depends because if the consequence of the change was that the burdened land could no longer be used, for example, for the purpose which had been anticipated, and there are cases like that, then, yes, that would be relevant and we'll look at North in a moment or two. But it's got to have, there's got to be some cause and effect. It's not just –

WILLIAM YOUNG J:
Well what about the fact that the rezoning on the economics of using it for its original purpose?

MR GALBRAITH QC:

No it's, with great respect, it's not a starter.

WILLIAM YOUNG J:

Well the figures aren't clearly in my mind, but the rates I think used to be $2000 or $3000 a year, they're now $27,000 a year. I think.

WINKELMANN CJ:

Why is it not a starter Mr Galbraith?

MR GALBRAITH QC:

Can I just answer His Honour's question first. If you just take the rates Sir we don't know, yes –

WILLIAM YOUNG J:

Well there's evidence –

MR GALBRAITH QC:

A planning witness said that but of course if you can't use land for a certain purpose then you can object to your rates. Now no evidence anybody objected to the rates or whatever so…

WILLIAM YOUNG J:

What sort of interests me is to whether restrictive covenant is material for rating purposes.

MR GALBRAITH QC:

The short answer is I don't know, which is the short answer Sir.

WILLIAM YOUNG J:

I mean assuming if rates are simply on value and the value is defected by covenants then there's not much room to move on an objection. There may be a few percent here or there but valuations aren't normally that far out.

MR GALBRAITH QC:

Well you can always object to rates, and there's hardship grounds and all sorts of grounds.

WILLIAM YOUNG J:

But only to the value, you can't say I don't think, or you can say my land's been valued too high.

MR GALBRAITH QC:

Well you can say your land has been valued too high, not many people want to say that, but you certainly can, and people do make objections on that ground, but if it's simply a question that your rates have gone up, then every covenant in existence is open to challenge on rates.

WILLIAM YOUNG J:

But it's gone up because – well, no, it's not just your rates have gone up, it's rates have gone up to reflect a zoning change.

MR GALBRAITH QC:

Well, the rates may have gone up to reflect a zoning change, the rates may have gone up just because everything goes up by five percent a year and land values traditionally so…

WILLIAM YOUNG J:

But not normally sort of 2000 percent.

MR GALBRAITH QC:

Well…

WILLIAM YOUNG J:

Or a thousand percent I think.

MR GALBRAITH QC:

Well, don't forget, Sir, that's the rates for the whole area, that's not just the rates for the covenanted area. So it's a much small sum of money and, as I

submitted, Sir, if the rates going up is a ground for modifying a covenant, well, that's –

WILLIAM YOUNG J:
Well, not what's being postulated.

MR GALBRAITH QC:
No.

WILLIAM YOUNG J:
What's being postulated is rates going up as a result of a zoning change.

MR GALBRAITH QC:
Well, as I say, the rates can go up for all sorts of reasons.

WINKELMANN CJ:
So, Mr Galbraith, just to take you back to the question that Justice Young started out with…

MR GALBRAITH QC:
Yes, sorry.

WINKELMANN CJ:
Which is why should the value of the land not be relevant to its reasonable use?

MR GALBRAITH QC:
Well, because the value of the land – well, that's a very open question, Your Honour. If we –

WINKELMANN CJ:
Well, it's the question that has to be answered in terms of the statutory scheme.

MR GALBRAITH QC:

Yes, yes, I understand, and I wanted just to come back to subclause (b), if I could talk about it in that context, because if – I was going to ask Your Honours, if you wouldn't mind, to go to the *Hinde McMorland* extract which we've got in our bundle at tab 8 of the further authorities. Because (a) and (b), which were the ones I was talking yesterday, have been in the law in effectively this form since 1952, and there's a very large body of case law, which of course this Court's not bound by, I accept that, and *Hinde McMorland* have been commentating on that body of case law since *Hinde, McMorland & Sim* first came out. And if Your Honours wouldn't mind just going to that tab, tab 8, and remembering also for a moment, because we've been talking about restrictive covenants but 317 applies to easements also, so we're starting to say all these other considerations which certainly in the past haven't been regarded as influencing a decision on modifying or extinguishing easements or covenants are now going to be extended in a way that my learned friend was arguing for.

If Your Honours wouldn't mind just going across to – *Hinde McMorland* give a history which, in my respectful submission, is useful. Synlait's written submissions, laude*Hinde McMorland* as being authoritative. They then look at the grounds for modification, and at page 138 at the foot they're talking about the (b), which is the reasonable use of one, which Your Honour the Chief Justice was just asking me about. They've dealt before that obviously with (a). In my respectful submission it doesn't really matter whether you're under (a) or (b), other than (a) is limited to an existing change of use and (b) is future, potential future use. And so, just picking up that first point, the criticism that was made of the Court of Appeal that they had said that future use was excluded by (a), the Court of Appeal was completely correct and the criticism made of the Court of Appeal was completely incorrect.

But just looking at (b) on page 138 for a moment, you'll see the text sets out the grounds, and then it goes on to say, in the second full paragraph, "The easement or covenant necessarily impedes the use of the burdened land in some way which would probably otherwise be legal," and which is the point of

course *Jansen v Mansor*, which is one of they cite, were saying. "The ground requires the continued existence of the easement or covenant now impedes that user in a different manner or to a different extent from that which could have been reasonably foreseen at the time of its creation., It is therefore the manner or extent of the impeding of the user which must have changed in ways not originally reasonably foreseeable. Thus, if the manner or extent of the impeding of the user remains the same, the ground is not proved," and it cites a number of cases, including *Jansen v Mansor*. Now the point of that is that one has to look at what the covenant is. If the covenant is a covenant linked to zoning, fine, then if the zoning changes it may be proper that the covenant should change, because that's what it's linked to. If the covenant say sits only a single storey building, that's not linked to zoning at all. That's simply a plain statement. It's only going to be a single storey building. If only one building can be built on a site, that's plain, one building. So the, whatever the change is, it doesn't effect the manner or extent of the impeding of the user. It's the same. When it started, when it finished. Single storey, single building. And (b) isn't there to alter that situation just because it would be a reasonable use now to put six houses on.

WINKELMANN CJ:

But it does change how it impacts. It is far more restrictive of what might lawfully be done there.

MR GALBRAITH QC:

No, it was always a single storey or one building. It's no more restrictive. It's exactly the same as it was when it was entered into. It hasn't changed at all.

WINKELMANN CJ:

Well actually I think the point is that they weren't entitled to build on that, unless they got consent from the Council, which is when Winstone stepped in, in the whole disputed, and it extracted the covenant. So in fact the covenant more or less aligned with the zoning.

MR GALBRAITH QC:

But the covenant isn't in terms of the zoning. The covenant is simply in terms of what you can do or not do. Forget about this particular covenant, but there are oodles of covenants around, open space covenants. Nothing to do with the zoning. Open space. The covenant doesn't change just because for some reason you can now build six houses on it. It's still an open space covenant. And so that's the point which *Hinde, McMorland* are trying to make here and that's the point that all those cases made, when one looks at those. So sure the Court can change the legal interpretation of little (b) but it's been interpreted that way since 1952, and so has little (a) and it's interesting actually, we'll come to *North* in a moment, but while Her Honour in *North Holdings* referred both to little (a) in the other consequences, the little subparagraph (c) consequences, and also referred to little (b) you find *Hinde, McMorland* not citing it here, he only cites it under the other consequences conclusion under little (a). And you'll also note in the cases they cite here of course they cite the Court of Appeal judgment in this particular case, which is in appeal, as being consistent with that body of decisions so…

ELLEN FRANCE J:

Mr Galbraith, in terms of the causative link, in this case if it's correct that the use now i.e. grazing requires a resource consent, and I know you can argue about how we got to that position in terms of not maintaining your existing use rights, but is that not a sufficient causative impact of the, in terms of the change in the effect of the covenant on the burdened land?

MR GALBRAITH QC:

A change like that could be, in this particular instance, well firstly for the reason that Your Honour says put to one side, and that's the first and must be primary reason, because if you bring it upon yourself well that's your problem not somebody else's problem. But the second is that a change like that could be, depending on the consequence of it perhaps put it that way, so you get cases where and, for example, Justice Elias when she was only Justice Elias in the *Rental Space Ltd v March* (1999) 4 NZ ConvC 192,873 case, which is in that bunch of cases there, was one where what, because of what had

changed, in fact the house couldn't be built because of the change which had taken place. Now, yes, that's a consequence which obviously, I say obviously, but it would seem to me that the Court properly would take into account. But a change, one that's self-created, no, and a change which can, as Mr Matthews says, be simply remedied by an application, wouldn't be in terror of the non-complying because of course even a non-complying which is a minor consequence will, as Mr Matthews says, will be very, very likely to be approved. So it's not setting up a hurdle. Now if it was a non-complying change of the sort that we're talking about in the power, the resource case, well, yes, that's quite different but, of course, here Synlait sailed through with a non-complying change. They had to get a non-complying change because of the extent of the development they were doing. They didn't comply with the zoning requirement. So I'm sorry, Your Honour, it's a long answer to say it depends. I'm sorry, I could have said that much more shortly.

GLAZEBROOK J:

So the submission is that it's not a change to the burden if – in fact, the burden, if you just look at clause 1 because there's no point looking at – or is it clause (a) or clause 1?

MR GALBRAITH QC:

Clause 1, yes, that's it.

GLAZEBROOK J:

Anyway, if you just look at that because in fact Synlait is offering to keep the other clauses in now, as I understand, and in fact even beef them up a bit, but if you're just looking at clause 1 the burden of that wasn't very great at the time that it was instituted because all that was available was a rural use. The burden now, and you say this is irrelevant, can be seen as much higher because you can't put it to a use that would actually give you much more return on the land and one that is now allowed by the zoning.

MR GALBRAITH QC:

That's right. That's what I would say.

GLAZEBROOK J:

So do you want to perhaps explain why you say that?

MR GALBRAITH QC:

Well, because otherwise covenants simply become contingent, contingent on somebody, you know, can do better out of it 10 years down the track. But can I –

GLAZEBROOK J:

But if you're looking at a change in burden, isn't that a change in burden because the burden was very light before because you couldn't do anything else with the land anyway?

MR GALBRAITH QC:

But it's the burden under the covenant. The burden under the covenant is you could only put one building on. That's the burden under the covenant. That hasn't changed at all.

WINKELMANN CJ:

I'm just finding it hard to see where you draw the line because it is the burden under the covenant that's changed. The weight of the burden under the covenant has changed if you can reasonably use the land for far greater things.

MR GALBRAITH QC:

But that's – what's intended by the covenant, the purpose of the covenant, is that there is only one building because that then protects the ability of the quarry to be developed. That's the purpose of the covenant. It's not changed by the fact that down the track you could build six houses on there under the zoning. That doesn't change the purpose or the burden of the covenant. The burden which has been accepted is we're only going to put one building on here, full stop. We'll only have an open space, full stop. But there's covenants in Wellington, there's a big lease case about one of them, which requires an open space between some buildings in Wellington. Now if the

covenant wasn't there, yes, they could build a very, very tall building, economically much better for them, but the covenant prevents that for the good reasons that it had a purpose to do that.

GLAZEBROOK J:

But the purpose was very different from the purpose in the case you took us to yesterday and I think Mr Miles accepted that amenity purposes of the open space and only one storey might conceivably be different from economic benefits, because in fact the purpose of that covenant was only so that the quarry wasn't going to be impeded and if in fact you're wrong and the quarry is not impeded then in fact the reason for the covenant has gone as well.

MR GALBRAITH QC:

Well, just dealing with the economic as against amenity, my learned friend complained about Courts taking into account things that aren't in the statute. That's certainly not in the statute and the statute isn't there to set up a licensing regime driven by economic considerations. The purpose of the compensation provision is not so the Court can licence.

WINKELMANN CJ:

I was going to ask you to take us to the statute and tell us whether we, how, link what you're saying is how we should view it to the words of (b) because it seems to me I'm having difficulty seeing it in (b).

MR GALBRAITH QC:

Yes, because if you go back to 317(1), on an application a Court may, by order, modify or extinguish the easement or covenant if satisfied that, there's (a), it ought to be modified or extinguished because of a change, blah, blah. (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."

Well, single storey, that's what the parties understood at the time, that's what they reasonably foresaw, nothing to do with changes in zoning. They knew that when they signed that it was going to be single – sorry, single storey is the *Jansen* case – and that's expressly said by what I would say, with respect, is a very strong Court in that case, quite directly, quite specifically said. And so when you come here and you say one further building or one building, that's what the parties reasonably foresaw, they could only put one building on there, never changed. There's no change in, there's no change affecting the covenant.

WINKELMANN CJ:

So, Mr Galbraith, what you're doing is you're saying you don't really look, it doesn't allow that the change of the reasonable use so…

MR GALBRAITH QC:

No, that's right, because otherwise, as I said, you're simply making the covenant contingent, contingent on reasonableness.

WINKELMANN CJ:

So what reasonable use –

MR GALBRAITH QC:

You're saying then that the covenant is, that the restriction will be reasonable any time in the future. That's not what restrictive covenants or easements are about.

WINKELMANN CJ:

Okay, But if we just look at the language. So you're saying that –

MR GALBRAITH QC:

Well, I thought I'd explained that.

WINKELMANN CJ:

No, but I'm just taking you back to the language again.

MR GALBRAITH QC:

Yes, sure.

WINKELMANN CJ:

Sorry, the change to the reasonable use – so Mr Miles is saying, "Well, look, if the reasonable use changes then that changes the burden," and you're saying when you look at the language of this you can't allow a change to the reasonable use to be the cause of the change in the burden?

MR GALBRAITH QC:

Yes. Sorry, I didn't – Your Honour's quite right.

And can I just – and that's what all those cases say too.

WINKELMANN CJ:

But there's nothing in particular…

MR GALBRAITH QC:

So, it's not original on my part.

WINKELMANN CJ:

No, but there's nothing in particular in the language, is it? You're just saying it's the cases that tell us that, and it's the scheme of the legislation that tells us.

MR GALBRAITH QC:

Yes, that's fair, that's fair.

ELLEN FRANCE J:

Mr Galbraith, I was trying to think about it in terms of an easement, the open spaces one might be the best example, but I was thinking about rights of way for example and how the purpose and presumably reasonable use would be to allow you to continue to, say, walk down to the beach using your right of way, even though everything around you had changed, and I was just trying to

think about how in that situation you would ever fit, you would say you would ever fit within (b)? But that may not be a very good example.

MR GALBRAITH QC:

Well, it would depend, the trouble is it all depends, Your Honour, on the facts, I mean, that really is, I'm sorry, really the only answer I can give, it depends on the facts. There have been any number of right of way cases, as Your Honour will be aware, there still are, and the Courts are, if I use this term, very protective of right of ways, easements with right of ways, very protective, because people try and chisel away at them, that's exactly what happens all the time – well, not all the time, sorry. But that is exactly what does tend to happen, people chisel away at them, they start putting a bit of their swimming pool out over the right of way, got a case like that at the moment, and there's been reported cases like that. So the Courts are very protective of that, because it is a proprietary interest, it has a purpose, and that's so you can get from A to B down the right of way, and just because it's more of a burden on one party isn't, in my respectful submission, a reason for it being modified. But if it's stopped serving the purpose for some reason of one of the parties have benefited from the right of way, it's stopped being able to be used as a right of way, or in fact that case of Justice Elias I was talking about, where because of a change in the law the restricted covenant actually prevented the access to the right of way to a new dwelling. Then in that particular case, no, it was refused, but, yes, it might be able to be granted.

GLAZEBROOK J:

Why do they use "reasonable" if your submission is it has to totally destroy it, the reason?

MR GALBRAITH QC:

Well, it depends what the, what I started off by saying, Your Honour, it depends what the covenant is. I mean, the covenant may be one which is linked to reasonableness, that's fine.

GLAZEBROOK J:

But the statutory language says “reasonable” and you say no, it doesn’t mean that, it means you have to have destroyed the reason for the covenant.

MR GALBRAITH QC:

No, no, I –

GLAZEBROOK J:

Or affected so badly the covenant itself.

MR GALBRAITH QC:

I'm sorry, I've been talking in the context of the single storey, or the whatever, but you can have covenants which are, as I said, linked to zoning for example, and we’ll look at the *North Holdings* one in a moment, which was linked to zoning and I don’t, with respect, agree with quite the way Her Honour got there under little (b) but I can certainly see that you could get there under little (b). It just may be helpful if I go onto it, talk about *Pollard v Williams* just for a moment, and then get onto *North Holdings*. *Pollard v Williams* you’ll remember is the judgment of Justice Francis Cooke in which he was asked to vary a covenant which, among other things, provided you couldn’t bring a second-hand house onto the site, you had to build a new house, and it was in a residential development, and a couple wanted to bring on a historic house, and they wanted to restore it to fantastic levels, really high quality, and so they applied, not under (a) and (b), they applied under little (d), and little (d) is the one, no injury. You’ve got to prove that there’s no injury. Now with the greatest respect to His Honour, it must be tempting I understand being on the Bench to say these things, his comments about balancing against the efficient use of land resource had nothing whatsoever to an application under little (d) so it’s probably about as obiter as you can get. But if that was correct, and my respectful submission is that it isn't, that again would drive a cart and horse through an awful lot of restrictive covenants. So, for example, in Auckland, as some members of the Court will know, the Council plan has now been amended to provide for intensification in many areas which were always single dwelling areas. Now if that means that you can come along and say,

well, the little old lady who sold off the back part of her section said you're only going to put one unit on there because I don't want to have 55 people tramping down my drive, and one can go along to court and say, oh well the zoning change now is for intensification and we should be able to put five units on there. Well, as I say, that drives a cart and horse through the purpose of the restrictive covenant, and which goes back to what I'm saying depends on what the covenant actually is and what it's trying to protect. So *Pollard v Williams*, with great respect, is very, very obiter and shouldn't be the foundation for any new approach to what's been well established.

North Holdings is a different case, and I do just need to spend a little bit of time in *North Holdings*. *North Holdings* was a case where there had been quite a significant development up on the north which was hoped to have developed an industrial estate. At the time it was, the development took place it was thought that it was compatible with the planning for the northern area around Marsden Point, and a number of about 16 I think of the sections were sold, and then the whole thing stalled because the Council brought in a structure plan which said, no, industry should be closer to the, I think the port area, and not out there. So the covenant was one which as is ay was defined in terms of zoning. So it's quite different from one storey or one house. It was defined in terms of zoning and the whole development stalled because with the structure plan change everything was going to head in close to the new industrial centre. Everybody got, well the people who'd bought sections and the developer who still owned the bulk of the sections got together with Council and Council was prepared to zone for mixed-use, which is a different use, and everybody bar one owner was prepared to go along with that, wanted that. And the one owner who wouldn't go along with it had been trying to get rid of their one or two lots for some time, and there was more than a suggestion that their opposition to the change of the covenant to mixed-use was motivated by their desire to have their lots bought back by the developer. Her Honour didn't decide on that basis at the end of the day because she said there hasn't been cross-examination so I won't determine on that, but it certainly formed part of the background to the consideration. What Her Honour did was she couldn't bring it under little (a)(i) or (ii) – sorry

little (a) subclause (a) or subclause (b) of little (a)(i) – and she bought it initially under little (c) which is any other circumstance the Court considers relevant, and so she talked about the, she wouldn't do it under change in the character of the neighbourhood, and she referred to *McMorland on Easements, Covenants and Licences* and she noted in paragraph 28 of her judgment that, "He notes that the basic concern is the effect of the easement or covenant if it were not to be modified or extinguished, not the effect of the order sought." So again that reference back to the covenant.

Paragraph 29 says, the other circumstances include the zoning changes where there is now a direct conflict between the covenant, which was intended to allow for development but now the zoning didn't allow for industrial development, so that's really the situation that Her Honour Justice France asked me about where you've got a change in the zoning and this, the covenant was tied to the zoning. So there you would have had to have gone and got a resource consent in the mixed-use zone for industrial use when nobody thought industrial use could fly. So the chance of that was zero or near enough to zero.

So in paragraph 30 on that ground she felt, or she held, that there should be a modification to the covenants, but she went on then to look at little (b), not quite sure why, but she went on to look at little (b), and without tying it as much to the terms of the covenant as I've suggested the case law previously had, and she talks there about the reasonable use et cetera, and in 32 says, "The current reasonable use… is as a "mixed use" development…" The previous reasonable use was an industrial development and accordingly the covenant impedes the reasonable use of the burdened land in a different way to a different extent at the time the covenant was created. Well in a sense that's right. It is different from the case of a single storey or the one building because the covenant was tied to a zoning, that's what it was tied to, and now that the zoning had changed you couldn't readily do the development in terms of the new zoning. So there had been a change. And provided, as is ay, you tie the change back to the covenant, and identify what the covenant, the purpose of the covenant, and whether the change is causative in relation

to that then, in my respectful submission, yes it can come within little (a) and little (b) of 317 but, and as I said before it's interesting that *Hinde, McMorland* only cited under the other consequences –

WINKELMANN CJ:

Mr Galbraith, can I just clarify therefore what your argument is under this one. You're saying certainly (b) can be used where the covenant is itself tied to zoning, as in *North Holdings*. I think you also agree that (b) can be used where the covenant, where zoning is changed and prevents conduct on the land.

MR GALBRAITH QC:

No, if it prevents the purpose of the covenant, so the covenant is no longer has a purpose because of the change, well yes then it can be changed. But it's got to be causative and in some way referable to the covenant. Finally on this topic, this was actually just meant to be a side discussion when I started down this road, it serves me right.

WINKELMANN CJ:

I imagine you've probably covered most of what you want to cover in relation to (b) now, haven't you?

MR GALBRAITH QC:

Yes, I think that's probably right, Your Honour. But can I just say the other thing which one's got to be a bit careful about is that it's not correct that the rural zoning which was on the land back when these covenants were entered into prevented or, sorry, was confined to a few cows and sheep and grazing the land. The predominant use of rural zoning will be agricultural in that way. But it was as Mr Comer confirmed in cross-examination this use that Synlait are making of developing a milk factory, an infant milk factory, was a conditional use under the rural zoning. So they could have applied under the existing zoning for a conditional use to erect a milk factory. Most of the Fonterra, well, not most, sorry, but many of the Fonterra factories around the countryside are initially on rural zoned land and rural zoning allows in many

rural areas for conditional uses, including the development of factories, that are associated with rural uses, and so it's not correct, with respect, to say that there has been a change in respect of the Synlait development between the pre-existing rural use and the now-industrial use. The industrial use, or the industrial zoning, sorry, will have a factory as a, I suspect it's predominant but it may be restricted discretionary, I suspect it's predominant, but a lot of zones now, predominant's actually gone out of favour or – for a lot of zoning now, and you find a lot of zoning now is restricted discretionary and the reason for that is because councils want to keep a bit of control over what's actually developed. It may not be true in residential but in activity-type uses councils prefer to keep a little bit up their sleeve so they can have some control. So restricted discretionary is pretty common. I don't know the answer here. I suspect it's predominant but it may not be. But certainly under the previous zoning of rural, as Mr – and the reference to Mr Comer's cross-examination is 201.117 and perhaps we should just quickly look at it. 201.117, and you see line 10, question, "With appropriate – the servient land used to be zoned rural?" Answer, "Correct, yeah." "And with appropriate resource consents it would have been possible to develop an infant formula manufacturing plant on the servient land at that time?" Answer, "I agree it was, I think, a discretionary activity under that rural zoning."

GLAZEBROOK J:
Sorry, I've just lost where you are.

MR GALBRAITH QC:
I'm sorry. It's 201.117. Yes, if you're doing it on computer. 201.0117, and just about line 10. So you'll see about line 15 Mr Comer, "I agree it was, I think, a discretionary activity under that rural zoning." In other words, you can put an infant formula manufacturing plant. A discretionary activity. "If the covenants are removed, with appropriate resource consents, a range of developments could take place on the servient land. Not just industrial development?" Answer, "Correct." "You'd accept that zoning does not provide the same degree of protection as a covenant?" "I guess the – let me think about that." "Well you accept a covenant prevents development on land

which applies regardless of the zoning." "Yeah, it provides a higher level of protection, yes," and that's the whole point about saying single storey or one building or whatever else. The covenant provides a higher level of protection than zoning and if you erode that protection by simply saying, well, the zoning changes and therefore the covenant changes, then covenants don't have a great deal of – or they become contingent, as I said before, they lose their efficacy.

WINKELMANN CJ:

I suppose the difficulty I have with your submission is it assumes a rigidity within the statutory scheme.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

Because there is, there must be more nuance in it by virtue of the ability to grant compensation now. So for instance, you had a piece of land which could only be used in a very limited way and you agreed, the Cleavers agreed for 200 years to use it in, covenanted to only use it in a ridiculously limited way and then it turns that because of rezoning it's now the most incredibly important land sitting next to Auckland Airport which would be used for, could give these people a large return on their land, would be in the public interest, et cetera, but you say, "Well, no, but that's exactly, well, he didn't want it used in that way and therefore the covenant binds." But doesn't compensation come in there? So I'm thinking that's why it's a discretionary thing, so the Court can look at it in a nuanced way.

MR GALBRAITH QC:

Sure. Look, I –

WINKELMANN CJ:

And on that analysis reasonable use in zoning does come into play.

MR GALBRAITH QC:

Well, a couple of points about that. I agree entirely that the compensation provision has assisted, that's what it was intended to do and the cases beforehand were cases where when they got to the, sorry, when the Judges got to the discretion to be exercised that they struck a snafu before compensation was there because there was something that they couldn't, it was going to harm the holder of the covenant, but not much, and they couldn't do anything about it so they had to say no to the variation. But you've got to look at the, with respect, to the – forget about (e) and (f) for a moment, but don't forget (d), which is if the person who is subject to the restriction can demonstrate that the person who's got the benefit of the restriction won't suffer much injury – you'd just use that terminology – then the Court has got the power to vary. So it's not that one's stuck rigidly. But if there's going to be much injury then, yes, they should be stuck, and an economist would say if they're stuck and the person who holds the benefit of the covenant is going to suffer much injury, then either rational discussion will produce an answer which squares it for both parties if the person who's suffering the burden of the covenant is going to make an awful lot of money and the party who's got the benefit of the covenant is going to suffer an awful lot of injury, then either they'll find somewhere in the middle or they won't. And (d) says, effectively the signal it's sending is you shouldn't be changing a covenant if it's going to affect a lot of injury on the person who's benefiting, that's what – and that's why Your Honour was quite right when you said to me, "You've got to interpret this in the full context of the section," I absolutely agree. But the full context of the section – and (d) has been there a long time, (d) has been there an awful long time – so these covenants aren't to be just put to one side if it's going to cause injury to a party. But I agree totally that he compensation provision is useful but it doesn't, in my submission –

O'REGAN J:

But isn't compensation really about economic loss that can be measured in monetary terms rather than amenity loss? I'm not sure where you get the big/small thing from, it doesn't say you can award compensation if it's a small amount, it just says you can award compensation.

MR GALBRAITH QC:

Yes, it does. But the difficulty, it seems to me, Sir, is that question you asked my learned friend, trying to reconcile (d) and the compensation provision. Because (d) is saying if it doesn't cause a lot of harm, well, then the Court can do it, and subsection (2) is saying compensation. But it really gets back to what I said before, that I don't think, with respect, that 317 is intended to be a licensing regime, so that one comes along to the Court and says to the Court, "Well, look, I can make a lot of money out of this and it won't cost them so much money, they'll suffer some injury but therefore fix some compensation and we'll change the covenant." I mean, that's a licensing-type regime and I don't believe that's, with respect, that was the purpose of introducing subclause (2).

GLAZEBROOK J:

Can I just check? If you're looking at (d), would it suggest – and you almost said this – that if it's not going to cause much injury then you said be able to change the covenant? So your argument at that stage would then be dependent on the argument that it was going to cause injury…

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

And I suppose you'll be getting on to whether that is the case or not?

MR GALBRAITH QC:

Yes, no, that's absolutely –

GLAZEBROOK J:

But then I just need to check whether you'd accept if there wasn't much injury then the compensation regime would work.

MR GALBRAITH QC:

Yes. No, I accept that, Your Honour, and I'm not really going backwards but could I just say something else about "reasonable user" for a moment? If it was that reasonable user and reasonable foreseeability was the test of it, if one thinks back to, as I said earlier on, these covenants can either be registered or notified and they're on the register, and I think back to this Court's decision in *Green Growth* where it was that the importance of the register was emphasised to the extent that a majority of the Court at least suggested that the normal approach to interpreting contracts could be confined so that a person could come along to the register and get the answer off the register without having to go back and find out what was the actual context of the contract. Now if we're going to have a regime in which reasonable user, reasonable foreseeability, is the test of whether the covenant which is shown on the register is defensible or not then how on earth does a purchaser who comes along, looks at the register, find that out? Got to go back 20 years, find out what the parties were thinking at that time? Think what they might reasonably have foreseen at that time? Think what the reasonable user was at that time? I mean that is, with great respect, completely inconsistent with the emphasis that this Court placed in *Green Growth* on the register. So –

WINKELMANN CJ:

But the whole scheme is on that, your analysis, because it certainly does bring in what's reasonably foreseeable. So I mean it does, the scheme does create uncertainty and you're just quibbling about how much uncertainty but you'd have to accept it creates uncertainty.

MR GALBRAITH QC:

Well, it depends on the covenant. There's uncertainty about a covenant which says "single storey, one building". There's no uncertainty. That is what I'm trying, not quibbling, what I'm saying is that if you look at the covenant, the covenant is either may be, some covenants won't be, but the covenant may be blindingly clear there's no quibbling to be had about it. It says what it says. If the covenant says, as in the *North Holdings* one, industrial zoning or

whatever it said there, and we know zoning has changed, then it's much more of an open question and you can do something about it. But, in any event, sorry, I was going back. Let's move on.

O'REGAN J:
We can't pretend that this section 317 isn't there.

MR GALBRAITH QC:
No.

O'REGAN J:
It does say covenants can be defeated. That's the nature of the covenant.

MR GALBRAITH QC:
Absolutely, and easements can be too, Sir.

O'REGAN J:
So why does the fact that it's registered take us anywhere, because they're all registered and they're all able to be defeated by application under section 317.

MR GALBRAITH QC:
Absolutely. Obviously they are, Sir. I'm not disagreeing with that. All I'm saying is that one interpretation is that if you saw on the register you can only have a single storey house I don't think there'd be any doubts about that, but if you then say, well, it all depends what the reasonable user was and the reasonable foresight was 20 years before, that was 1957, in fact, that, 1958, I mean it's impossible for a purchaser.

O'REGAN J:
It may be but if that's what section 317 requires that's what we have to do.

MR GALBRAITH QC:
Yes, sure. All I'm saying is that that's a reason for not interpreting section 317 in that way. That's all I'm saying, Sir, and –

WINKELMANN CJ:

But those are the words of section 317. Reasonable foreseeability is the words of section 317.

MR GALBRAITH QC:

Yes, well –

WINKELMANN CJ:

So yes, I think you've got…

MR GALBRAITH QC:

Yes, I think we've been there.

WINKELMANN CJ:

We have. Sorry, about that, Mr Galbraith.

MR GALBRAITH QC:

Can I just say a little bit about – look, I haven't got to our submissions yet.

WINKELMANN CJ:

I think you have – yes.

MR GALBRAITH QC:

No, but I've done (b). I take Your Honour's point, don't worry.

The purpose of this covenant, as I keep saying one has to look at the covenant, was to protect the opportunity to develop the basalt resource which, as you've seen, is entirely situated on NZIPL's land and it remains zoned for aggregate extraction. Quarrying is a restricted discretionary activity and His Honour, Justice Young, where do you find that. You find that on 303.1133. So that restricts the exercise of the discretion and you can see what I said before. Restricted discretionary, councils like that because it gives them a chance to – I was going to say "fiddle round the edges" but that's not

quite fair – to impose conditions or make the particular proposal more compatible with what they think it desirable.

So the evidence before the Court was, and it's throughout all the Franklin District considerations of various plan changes, was that this was a valuable resource, that there was local demand for it, and the Council in making various plan changes was throughout conscious and sought to protect the development of the resource.

Now I'll just say something very quickly about quarries. I mean, nobody, it's one of those NIMBY things, nobody wants it next-door to them. The quarries are absolutely fundamental to the construction of this building for example, and I think the stats are that it's about eight tonnes per person per year quarriable material. So to get a zone for quarry purposes and actually have some basalt in the zone and be in a locality where it's not going to have to be trucked for miles and miles and miles is a valuable resource which, as I say, the District Council and the Regional Council and the Court of Appeal recognised.

It's perhaps just on that note worth having a look at the exhibits 302.0561, because this explains the background to the industrial zoning which was approved in 2012. You'll see 302.0561, paragraph 4.59, "Industrial zoning strategy," above that. PC 24 this was a plan change that introduced the industrial 2 zoning that the Synlait land now has. "PC 24 provides for industrial land uses in two zones to the south and west of the main trunk line. The industrial 2 zone makes provision for heavy industrial activities most likely to generate adverse effects. This is adjacent to the existing aggregate extraction and processing zone." 4.60, "Quarrying activities have not been established in the Aggregate extraction and processing zone despite a resource consent authorising such activities, which has now lapsed. It was assumed in preparing PC 24 that such activities could commence at some point in time subject to resource consent approval as a restricted discretionary activity. The DGS identified Pokeno for industrial land and the authors of PC 24 considered that there would be potential synergies in locating heavy

industrial activities adjacent to a quarry, particularly if heavy industrial activities required aggregate." So there's the recognition, valuable, local, put it by the heavy industrial activities. 4.61, "The aggregate extraction and processing zone is based on the location of suitable rock," obviously, "and was established previously by the FDP," Franklin District. "In addition, locating industrial land between a quarry and residential activities enables the industrial land to buffer effects generated by the quarry such as noise, dust and vibration. For this reason, the industrial 2 zone which allows for heavier industrial uses was located adjacent to the aggregate extraction processing zone. Adjacent to the industrial 2 zone is the light industrial zone which provides lighter industrial and service activities. This zone is intended to act as a buffer between the industrial zone and residential areas lying to the north and further up Hitchen Road." So that's where Yashili is, of course, on the lighter industrial. So there was a rationality in what the Council were trying to do in –

GLAZEBROOK J:
Can I just check? That actually seems to go against you rather than for you.

MR GALBRAITH QC:
Do you think so, Your Honour? I thought it was…

GLAZEBROOK J:
Well, in the sense that they were actually saying, "Let's change this into heavy industry because that will provide this buffer zone."

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
So it actually looks as though they're saying, well, they'll all get along very happily together.

MR GALBRAITH QC:

Well, they would've if it had been the Hynds concrete block, sorry, concrete pipe, it would've been exactly what the Council had anticipated but, as I'll come to in just a moment, an infant formula factory which is particularly concerned with contamination, dust, et cetera, by both regulation and by pure common sense, is not the heavy industrial use that they were contemplating, and as you know the Yashili factory is actually in the light industrial zone.

WILLIAM YOUNG J:

Just explain that to me. Is the impact on the infant formula factory likely to be significant if the owner of the infant formula factory doesn't object?

MR GALBRAITH QC:

Well, we've got to talk about that, Sir, but the concern has been that of all the uses that you wouldn't have contemplated there when the Council were talking about heavy industrial uses would be an infant formula factory. Nobody, talk about reasonable foreseeability, nobody reasonably foresaw that that was the likely use that was going to turn up on the covenanted land.

WINKELMANN CJ:

Well, they can't be that worried about it because they've allowed Yashili to be in basically the same spot, distance from the quarry as Synlait – is it "Synlai" or "Synlait"?

MR GALBRAITH QC:

Well, yes, whichever it is.

WINKELMANN CJ:

We went through that, yes.

MR GALBRAITH QC:

I'm not sure, Your Honour, and I probably –

WINKELMANN CJ:

Mr Miles, is it “Synlai” or “Synlait”?

MR MILES QC:

I prefer the French.

MR GALBRAITH QC:

He would. I didn’t say that.

WINKELMANN CJ:

I’ll keep going with Synlait then. Yes, because effectively it’s almost equidistant. There might be a little bit in it but it’s not a great deal so how do you answer that point?

MR GALBRAITH QC:

I’ll take you to the evidence of the Yashili ex-manager who says it is different. But that’s the – when you read, and that’s why, with respect, I disagree that that statement by Council is against me because they’re talking about heavy industrial and the one thing that the Synlait plant is it’s not heavy industrial. It’s light industrial because there it is with Yashili in the light industrial zone, so it’s not heavy industrial. It’s not what they were thinking about because they are saying that heavy industrial cheek and jowl with the quarry is a good use, and let’s look at the – it’s annexed to our submissions. Let’s just quickly look at our schedule 1. So in schedule 1 we’ve got dairy factory regulations.

Clause 13(e). So schedule 1, clause 13, “Places of food business,” et cetera. The operator must ensure design, construction, location – managing, proximity to activities could result in contamination. (f) Ensuring to the extent reasonably practicable the place is designed, constructed, located so as to exclude dirt, dust, fumes, smoke, and other contaminants.

The Animal Products (Dairy) Regulations, similar. Fitness of dairy product for its intended purpose in (a). (b) Operate to minimise, manage the exposure of dairy material or dairy product or associated things to risk factors.

Operational guideline for dairy premises and equipment. Product factories shall be located in areas free from objectional odours, smoke, dust and other contaminants which might be produced from neighbouring industries, or any other hazards which could affect the safety of dairy products.

The Animal Products Notice – Manufacture of Dairy Based Infant Formula. Must be protected from contamination.

Animal Products (Dairy Processing Specifications). Premises are located so as to minimise the risk of flooding, objectionable smells, smoke, dust and other contaminants.

Well, the one certainty is a quarry is going to produce dust among other things.

WILLIAM YOUNG J:
But why does that matter? Isn't that all down to Synlait?

MR GALBRAITH QC:
No.

WILLIAM YOUNG J:
I mean the obligation is imposed on Synlait, isn't it?

MR GALBRAITH QC:
No, it's not, Sir, because the issue is when the quarry comes up for resource consent that Council has got to take account of the effect on the receiving environment which –

WILLIAM YOUNG J:
I agree that there's – you can talk about the receiving environment but if you're looking at specific effects on a particular property and a particular business, and that the owner of the property and the operator of that business

say, “We can deal with it. We’re not worried about it. We can cope with that effect,” is the Council likely to say, is the Council really likely to say, “Well, you don’t know your own business”?

MR GALBRAITH QC:
Council has got to take account of those effects on the receiving environment, with great respect, whatever an owner may or may not say. Yashili and – well, perhaps we should go to the Yashili evidence, Sir.

WILLIAM YOUNG J:
Well, what do you say, the evidence about the receiving environment is that we can deal with them?

MR GALBRAITH QC:
The Council – well, can I take you to the Yashili evidence?

WILLIAM YOUNG J:
Yes, take me there.

WINKELMANN CJ:
It’s just, the difficulty that I have is the notion that Council would go behind Synlait’s assurance that it can deal with it, and it doesn’t matter what Yashili says about it’s situation, Synlait’s a different entity.

MR GALBRAITH QC:
Well, Council has statutory obligations, and the statutory obligations – and this is the purpose of Synlait producing their undertaking, is to mitigate the obligation the Council’s statutory obligation to consider the effects on Synlait. But if I could just take you to the Yashili evidence, because –

O’REGAN J:
Is this the new evidence?

MR GALBRAITH QC:

Yes, I think it is – oh, it's not new evidence. I thought it was. It's in 202.0256, which is behind tab 37. No, it's not new evidence, I'm sorry. You'll see, paragraph 1, he says – well, use an English name – 2, he was, "The general manager of Yashili from 2012 to 2017. In December 2012 Yashili purchased land in Pokeno for an infant formula manufacturing plant. I was responsible for the selection of that land and the subsequent design, construction and operation of the plant." 4, "When selecting a site for a dairy plant it is important to ensure that it is designed, constructed and located so as to exclude contaminants, including dust. At the time Yashili purchased the Pokeno land for its plant it was aware that there was land zoned for aggregate extraction nearby. However, Yashili was informed that Winstone would not be establishing a quarry. Yashili took a calculated risk that no other person would elect to undertake quarrying activities on the land zoned for aggregate extraction. There are various zones in all dairy plants, including the Yashili dairy plant at Pokeno. The high care zone contains the spray dryer and the filling room. The high care zone is the most sensitive area of the plant to contamination. It is the area that it is most important to keep free from dust and other contaminants. The high care zone is located within the tower on the north-western corner of the Yashili plant. The high care zone has two air inlets. The two air inlets are on the northern corner of the plant, facing north-east. They are visible on the second page of," and you remember I took you to it, a photo which showed you where they were.

"I recall that Yashili investigated the predominant wind in the area and placed the two air inlets facing away from the predominant wind, being a westerly or south-westerly. The air inlets face away from the predominant wind to reduce the risk of contaminants entering the high care zone. The medium care zone is the drying environment that surrounds the high care zone. The medium care zone is also located in the tower on the north-western corner of the Yashili plant. The medium care zone also relies on the air inlets that service the high care zone. The low care zone is the large low-rise building to the east of the drying tower. The low care zone is primarily a warehouse. It is not as important to keep the low care zone free from dust and other contaminants.

The design of the plant reduces the risk of contamination if a quarry is built on the dominant land. In particular, the low care zone is between the dominant land and the areas sensitive to contamination. In addition, the air inlets face away from the dominant land. However, despite the design of the plant Yashili would be very concerned about the risk of contamination if a quarry was built on the dominant land. If I was still the manager of the Yashili plant I would oppose resource consent for a quarry on the dominant land because of the risk of dust contaminating the plant as a result of the quarry –

WINKELMANN CJ:
Doesn't this suggest that' it's Yashili, not Synlait, who's your problem?

MR GALBRAITH QC:
Synlait's closer, and for the reasons –

WINKELMANN CJ:
But they're saying, "It's not a problem for us," but Yashili is saying it is a problem for them.

MR GALBRAITH QC:
That's what I'm saying, the Council have to take account of its – it's the same use and…

GLAZEBROOK J:
Well, you then have to say that the likelihood is that the Council would say, "We don't care what Yashili says about their concern and we will grant the resource consent anyway for the quarrying."

MR GALBRAITH QC:
The Council may do, yes, the Council may do that. All I'm trying to explain at the moment is that it's not a slam dunk because Synlait say that they can cope with it.

WILLIAM YOUNG J:

But if they can't cope with it then they've got to be shut down.

MR GALBRAITH QC:

Well, or the quarry gets shut down.

WILLIAM YOUNG J:

No but, if Synlait build a plant next to a potential quarry, they know there's a potential for a quarry there, although for various reasons, presumably like Yashili, they discount the likelihood. They are not going to complain about any consent application for the quarry. They are saying that we can cope with it. Now what is the evidence. What evidence is there? How will there be any practical way in which the effect on Synlait will come to bear in the Council's consideration. Your client isn't going to be saying, "Oh, we don't want to do a quarry, we're worried about Synlait."

MR GALBRAITH QC:

Okay, can I just finish with the affidavit and put that aside.

WILLIAM YOUNG J:

Well I do want you to come back to this.

MR GALBRAITH QC:

Of course I will. Well Your Honour will take me back if I don't.

WILLIAM YOUNG J:

Well I probably will invite you to return to it.

MR GALBRAITH QC:

That's fine. "The extent of the opposition would require a detailed assessment," etc, etc. 11, "If the Yashili plant was located on the land on which the Synlait plant is being built, I would be even more concerned with the potential for dust contamination. The Synlait plant and, in particular, the drying tower that will contain the high care zone and medium care zone, is located

much closer to the Dominant Land than those zones in the Yashili plant. In addition, the Synlait plant appears to be more susceptible to the predominant westerly wind."

So there's the Yashili expert opining that Synlait's got a bigger problem. Now what Synlait has said about that is in the new evidence because it's Mr Clement saying it, and I'll just have to find where he says it. It's 202.0259.

WINKELMANN CJ:
202.0259. It's on the next tab.

MR GALBRAITH QC:
Sorry, the next tab, yes. There's another thing which he says in here which are, in my respectful submission, of relevance. One of the things which he says, and it's not this issue, is that we're pushing ahead with the factory because we want to get it complete in time for the next supply season to make their customers, meet their customers growing demand, and what he says, he talks then about the undertakings, and it's paragraph 24 I think, which is the effective paragraph. "The reasons why Synlait has given the undertakings, and why it does not object to NZIPL operating a quarry on its land, may be summarised as follows: (a) Synlait is confident that any noise and vibration from quarrying machinery, vehicles and blasting on NZIPL's land (where a quarrying site is likely to be on higher land some distance from Synlait's plant) will not negatively affect Synlait's plant; (b) Synlait considers it very unlikely that an operator of a quarry would allow flying debris to cross over its boundary, but in any event, as I say above, a quarrying site is likely to be on higher land some distance from Synlait's plant, so this is not likely to be an issue." Then this is the dust one. "(c) While quarrying may potentially generate significant amounts of dust, Synlait's plant is designed to ensure that it is not affected by external contaminants such as dust. Dust in the air will cause increased loadings on the filters used in the new plant, which Synlait can manage by undertaking more frequent filter maintenance. Dust that ends up in the storm water network and sedimentation pond can be managed by cleaning the sedimentation pond. It is possible that increased acidity from the

dust may slightly reduce the life of the roof of the plant, but Synlait considers this risk to be low."

So that's what Synlait said. Now just pause for a moment and realise, sorry, in my respectful submission, this issue should have been before the Court at a time before the plant was built. So it should have been a consideration as to whether when Synlait came along and said, "Look, we're thinking of buying this land," because that's what one would expect, "We're thinking of buying this land. We want the covenants modified." A Court would be considering it in a context where Synlait didn't have to buy that land, they could go down the road and buy some other land, or they could have somewhere else where milk trucks could get to, and so this would be a, one of the questions would be, "Well why should these covenants be modified when you've got the choice of the whole Waikato to locate your plant in." What we've now got is a situation where Synlait have created a problem, where we don't have a heavy industrial use located on the burdened land. We have something which is a light industrial use, which the Yashili manager says is sensitive to dust, and which he at least would be concerned about in respect of the implications. Now His Honour Justice Young has said, well if Synlait are prepared to take the chance well too bad, but what the evidence is from unfortunately from the Synlait planning experts, who knew nothing and repeatedly said they knew nothing about the operations of an infant formula plant, was that those concerns could, nobody could say would, could affect either the consent or the conditions of the consent, make them tighter, or could affect the operations of the quarry if in –

WILLIAM YOUNG J:
Even if no one is voicing those concerns?

MR GALBRAITH QC:
Well they would be being voiced Sir because Yashili would be voicing them, and the Council has got an obligation to consider statutory what's going to happen in the receiving environment, and if it goes wrong it's not simply going to be, well tough, on Synlait, I was involved in the Fonterra Danone situation,

that was just gunk in a pipe that caused there, as Miriam Dean's report demonstrates. So gunk in a pipe can have ended up in the back end of a $1.5 billion claim. Happiest day of my life when we got out for around about $200 million.

WILLIAM YOUNG J:

But isn't that, I mean it's still, I don't know, it still seems to me that it's down to Synlait, if they, I mean Yashili can give evidence and say we're worried about our plant even though the witness for Yashili will have his own affidavit rammed down his throat should he say so, and who's then going to say Synlait didn't design their plant properly to deal with the possibility of dust. Who is going to say that?

MR GALBRAITH QC:

Well, the actual evidence before the Court is three planners all saying that could have an effect on –

WILLIAM YOUNG J:

Were they postulating it, the concerns not actually being advanced by the people who would be affected most directly by them? Was that what they were directing their replies to?

MR GALBRAITH QC:

No because the evidence in the High Court was before Synlait had the idea of providing the undertaking. So the evidence in the High Court is that without the undertaking, Sir, the new evidence is post the undertaking, and while it's correct that the planning evidence is that if there is a written consent, effectively, filed with the Environment Court, it that's where it ends up, or with the Council, that the effect on the consentor can't be taken into account. It doesn't relieve Council of its obligations under, I think, section 204, and it doesn't relieve Council of its obligations in relation to things such as, you've heard the discussion between my learned friend and Her Honour Justice France about particulates et cetera in the area, but just sticking with the sensitivity issue, the onus is on the applicant for a variation or modification

to the covenants to discharge that there will not be an adverse effect contrary to the purpose of the covenants from the change which it's promoting, and the purpose of the covenants is so that one doesn't end up in a would-be/could-be situation, and we're left in a would-be/could-be situation at the moment where the –

WILLIAM YOUNG J:
Just going back, section 204 is notifying application.

MR GALBRAITH QC:
I'm sorry.

WILLIAM YOUNG J:
104, is it?

MR GALBRAITH QC:
Yes. I'll come back to it soon and identify it. But we're left in a situation where all the planners say that could be a consideration and it could lead to a tightening of the conditions, et cetera, and, of course, in the operation itself it could affect the operation. So that's the concern and unfortunately it wasn't met at the time where it was – there wasn't a factory there when it should have been there.

GLAZEBROOK J:
And you say that's greater than the risk from the Yashili objection?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
And that's because of the proximity issue, is that…

MR GALBRAITH QC:
And the planners accepted that.

WINKELMANN CJ:

So the planners didn't – were the planners asked if the Council has evidence from Synlait that they can meet any concerns, this will still – were they asked about that hypothetical?

MR GALBRAITH QC:

No, because the planners gave their principal evidence in the High Court before there was any question of the undertaking. But Mr Comer –

WINKELMANN CJ:

This evidence that they can clean the filters, et cetera…

O'REGAN J:

That's new evidence.

WINKELMANN CJ:

That's new evidence?

MR GALBRAITH QC:

New evidence, yes. So there's from Mr Comer, for example, new evidence saying that now there's an undertaking, therefore – wait a moment. Let's find it.

WINKELMANN CJ:

And you haven't filed any evidence in reply saying –

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

From this point though, saying that a council would look past it? I know you filed evidence in reply which I've read but I don't recollect seeing that.

MR GALBRAITH QC:

Yes. Well, Mr Matthews has filed evidence in reply. Let's just find Mr Comer's. Mr Comer's is –

GLAZEBROOK J:

So what do you say the undertaking added, because it didn't – I mean it added a consent but not – there was quite a lot in the – there is quite a lot in the original covenant itself, isn't there?

MR GALBRAITH QC:

Yes, there is, and that's what I say. The original covenant would have ruled out the, would rule out what Synlait have done and you wouldn't be into this would-be/might-be situation of hypotheticals. It's not –

GLAZEBROOK J:

Sorry, I'm – yes, obviously one does but what about the rest of the covenant?

MR GALBRAITH QC:

The rest of the covenant…

GLAZEBROOK J:

I'm just not sure where it is at the moment so can you perhaps tell me where it is again?

MR GALBRAITH QC:

Yes, it's volume 301, I think.

GLAZEBROOK J:

301?

MR GALBRAITH QC:

No, don't take me as gospel till I check it up, Your Honour.

GLAZEBROOK J:

Yes.

MR GALBRAITH QC:

301, page 6, I think, my guess.

WINKELMANN CJ:

301.301?

MR GALBRAITH QC:

301.301 and then the covenants I think are at page 6. So the first covenant is the one about should be only used for the purpose of grazing, et cetera, et cetera. Second one is simply about advising people. The third one is the covenant will allow the covenantee to carry on the activities of quarrying without interference or restraint from the covenantor. Fourth one is covenantor shall not…

GLAZEBROOK J:

Well, I'm just looking at 6, for instance.

MR GALBRAITH QC:

"The covenantor shall not, as part of any application for a resource consent"…

GLAZEBROOK J:

All the undertaking did was make that a positive rather than a negative, didn't it?

MR GALBRAITH QC:

Yes, I think that's right. I think that's right.

WINKELMANN CJ:

So just looking at Mr Matthew's evidence in reply which, when I read it, I thought he'd just moved off the whole thing about concern regarding the Synlait client and moved on to particulates and the atmosphere.

MR GALBRAITH QC:

Yes, that's right, because if you just go back to Mr Comer's evidence, well, perhaps Mr Matthews' seeing that's where Your Honour is.

What Mr Matthews says is that the letter from Synlait wouldn't constitute a written approval in respect of a resource consent application so you'd have to actually get a written approval and it's problematic –

O'REGAN J:
Whereabouts are you?

MR GALBRAITH QC:
I'm sorry, this is Mr Matthews. This is 202.027, well, it starts at 0274, 202.0274. And perhaps just let's talk about the undertaking for a moment. I was going to come to that much later but –

WINKELMANN CJ:
You're in Mr Matthews' reply evidence, are you?

MR GALBRAITH QC:
Yes.

WINKELMANN CJ:
And at what paragraph?

MR GALBRAITH QC:
If you go to paragraph 6, he refers to the undertaking letter and he says, as Her Honour, Justice Glazebrook, has pointed out to me that the undertakings and assurances are broadly consistent with the obligations under the covenants except that the letter is more limited in that it only applies to the Waikato District Council where in fact the Waikato Regional Council is involved in relation to dust, et cetera, so it doesn't go the full course, but goes on to say Synlait has also undertaken that it will take reasonable steps to support an application, any necessary consents. He says the letter wouldn't constitute a written approval in respect of the resource consent application.

WILLIAM YOUNG J:
But it would be –

WINKELMANN CJ:

Paragraph –

WILLIAM YOUNG J:

The undertaking would catch that though, wouldn't it?

WINKELMANN CJ:

Yes. That's about the form but paragraph 8 is the approval.

MR GALBRAITH QC:

Well, that's what I'm just going to say, that he goes on to say that the undertaking could require Synlait to provide its written approval and he says he agrees with Mr Comer the effect of Synlait giving a written approval is that the consent authorities can't have regard to any effect of the proposal upon Synlait itself when considering the resource consent application, which was right. It would not prevent consent authorities considering complaints or effects of any non-compliance with consents once the consents are granted. Written approval wouldn't prevent Synlait from subsequently complaining about excessive dust. May involve enforcement order, et cetera, et cetera.

WINKELMANN CJ:

But doesn't his concession at 8 give you a problem for the submissions you've just been making?

MR GALBRAITH QC:

Well, because he's goes on, you'll see in 11 – where are we? " In other words, a written approval," 10, "has little effect beyond the time of consideration of a resource consent application, unless the conditions of consent expressly exclude consideration of ongoing effects on the provider of the written approval." And, in addition, in an application the consent authorities would be obliged to consider the cumulative effects of the plant and the quarry, despite any written approval from Synlait. So that's having to look at the cumulative effects in the receiving environment, and then he goes on to talk about particulates, et cetera.

The difficulty is the letter is, well, the letter is what it is. If it had been more particular then that might be of some assistance.

WILLIAM YOUNG J:
Did you ask for a more particular letter?

MR GALBRAITH QC:
We didn't ask for it in the first place, Sir.

WILLIAM YOUNG J:
No, no, but I mean if it's a matter of tweaking the details then they could have been tweaked, I imagine, but –

MR GALBRAITH QC:
Well, that's, with respect, not –

WILLIAM YOUNG J:
No, you're not necessarily going to want to do that because it suggests you accept this is the solution, but if generally it's a solution then treating as sort of a once and for all offer is a bit unrealistic, isn't it?

MR GALBRAITH QC:
Well, that's all that Synlait have ever given, Sir, is a once and for all offer and it is, of course, subject to the problematic complications of enforcing it if, for example, Synlait don't like whatever the quarry proposal is because Synlait hasn't bound itself to whatever quarry proposal is made. They've bound themselves in general terms but not bound themselves, because there aren't, there isn't a specific proposal at the moment, to specific terms and there's a lot of wriggle room, Sir, in that.

WINKELMANN CJ:
Well, we could always make a condition of any order and fix that up, couldn't we?

MR GALBRAITH QC:

Yes, accept that.

GLAZEBROOK J:

But wouldn't the covenant itself, and I think we've got to the stage possibly where it was accepted that if one went, the rest would stay. It's relevant to see that much wriggle room there, isn't it?

MR GALBRAITH QC:

Yes, it –

GLAZEBROOK J:

Unless the proposal for the quarry is so out of all proportion that the Council wouldn't possibly accept it anyway.

MR GALBRAITH QC:

Yes, that's right, when the evidence is not of – well, if it was all out of all proportion, yes. I mean what Mr Matthews said is that the fact of the Synlait plant, and for that matter the other plants too, means that in designing a quarry proposal you'd have to take account of that, in other words you couldn't go over the top in the way Your Honour was suggesting to me, so it does have that implication which if the covenants simply apply, well, it wouldn't because there wouldn't be that plant there, but I understand and accept what Your Honour is saying, that if we're talking about modification and tightening that as Her Honour, the Chief Justice, perhaps, I'm not saying committed to but just mentioned, then it's potentially a different situation from the all or nothing which it looked like on the application.

WILLIAM YOUNG J:

Can I just raise something with you because it's something you may want to deal with over the adjournment? I take it there was discovery on all sides?

MR GALBRAITH QC:

No.

WILLIAM YOUNG J:

Was there not discovery?

MR GALBRAITH QC:

No. There's originating applications, Sir, and no discovery.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.48 AM

MR GALBRAITH QC:

Thank you Your Honour. Just taking up that issue about the undertaking, et cetera, as we noted in, it's paragraph 7.8 of our submissions, the fact of an opposition with objection being filed doesn't relieve the local authority from the necessity to consider the receiving environment, it's section 104, I think I must have mis-stated it before, section 104. If an approval, if a written approval is given to the application then section 104 provides that the effect on the party is given a written approval can't be taken into account, and that's where then Mr Matthews saying well that letter isn't a written approval, and it would have to be a written approval, but if a written approval is filed then the Council still has to take into account cumulative effects in the area which was the discussion that Her Honour Justice France had with my learned friend the other day about particulates et cetera. It's not just particulates in the air, it's anything else which is cumulative in terms of noise, dust, traffic, et cetera.

WINKELMANN CJ:

They don't seem to be too worried about that though, do they, in that decision – not the decision, in the document you took us too before, it makes the point that, their 302.0561, makes the point that the industrial zoning is preserving the ability to have the basalt.

MR GALBRAITH QC:

Your Honour is quite correct about that. It's only the sense that – well, the added thing is the sensitivity of this particular use and if there's a written

approval given then the sensitivity of that particular use can't be taken into account, but the written approval has got to be given and the difficulty is of if we go back to the discussion with Justice Glazebrook a moment or two ago, that if we are in the realm of the covenant being modified, if it were modified to require written approval would be fine, but I suspect that the Synlait objection would be we don't know what we'd be giving written approval to, which is the point I was making about the undertaking at the moment, that it's got its wriggle room in it. So that's probably…

ELLEN FRANCE J:
Just on that last point. The letter says it will not object to or oppose any application by NZIPL for resource consent and any other necessary approvals. So that's quite broadly expressed.

MR GALBRAITH QC:
Yes, but that's opposition or oppose but you actually need a written approval under section 104.

ELLEN FRANCE J:
No, I understand that.

MR GALBRAITH QC:
Yes, it is broadly expressed, no I accept that Your Honour. I'm not going to go through a lot of the subjects which I've traversed, but could I just take you to a couple of aspects of evidence because it, in my respectful submission, may be relevant when we come to, which I have to, questions of if there is a modification, compensation. Our 3.13 is a reference to –

GLAZEBROOK J:
Sorry?

MR GALBRAITH QC:
Sorry, this is now in our submissions, paragraph 3.13, I'm sorry. There's a reference to when the NZIPL land was originally transferred to Mr Harris'

company Havelock, and Mr Harris gave evidence in, this is new evidence in reply, so this is new evidence, I'd just like to take you briefly to it, but it has some relevance also to the question His Honour Justice Young asked a moment ago about discovery, and his affidavit is at 202.0291. Tab 43. So he says, paragraph 2, “In 2013 Havelock purchased the property knowing that it was zoned for quarrying.” After purchasing the property we made contact with the Waikato District Council to enquire to the future direction of zoning et cetera. Likely to remain as aggregate extraction as the rock resource was regionally important for the future needs of infrastructure projects in Auckland and the Waikato. Paragraph 4, “The entire time that Havelock owned the property my family and I were consistent in our approach to protecting the ability…”. Paragraph 5, “From the time of purchasing the property… we leased 45 McDonald Road,” which is the Synlait property in effect, “… and restricted our use of the property to grazing of livestock and cutting of grass as supplement feed.”

Paragraph 6, “The lease agreement had a three month notice period… 2017, Fletchers informed me that it had sold the property. I was told that the purchaser wished for us to continue to graze the property, and to keep paying the monthly rental,” we did that.

Paragraph 7, “In late February 2018, I was called by someone from Euroclass on behalf of Stonehill… to enquire if I was the person grazing… I confirmed that I was. I was told that I had to vacate the property immediately. I enquired why and was told that it was nothing to do with me. I explained that I had a lease… person I spoke to said he was not aware of this but needed me off that day as there were people turning up the next day to start working on the property. I subsequently vacated the property within the next week… no mention of the plans for the property or discussion regarding the covenants.”

Paragraph 8, “In late March 2018, I received an email from my accountant asking me to call a solicitor… I phoned the solicitor and was told that he acted for a neighbour and he just needed me to sign a form to remove some redundant covenants from his client’s property. He said that he could send

the form through to me and, once signed, he would arrange for the removal. I felt that he thought I was just a simple farmer who would not understand the significance of his request. I informed him that this was likely not that simple and that he needed to send his request through to Havelock's solicitor."

Paragraph 9, "The request was received and, once I saw what was requested, Havelock responded in the same manner that it always responded to such requests. That is, Havelock noted that the property was zoned for aggregate extraction and, as such, required all the protections to remain in place… was in discussions with a potential purchaser… if his client was interested, Havelock could make the property available."

Paragraph 10, "I subsequently met with Mr Peter Bishop… showed him over the property. I explained to him the need to protect the ability to quarry the property. Paragraph 11, "In early March 2018, I was approached by an agent from Barfoot & Thomson… Mr Ye's interest in purchasing the property... asked questions regarding the aggregate extraction zoning. I explained… that the property had the benefit of several covenants that protected quarrying. I also told Mr Ye that we had protected these covenants while we had owned the property."

Paragraph 12, "On 2 May 2018… agreed to sell the property… informed Mr Bishop that the property had been sold… In response he demanded Havelock remove the covenants or he would take us to court…. felt that… approach was unduly aggressive."

Paragraph 13, "The first time that I was contacted by Synlait was a call from John Penno of Synlait, well after Havelock had entered into the unconditional agreement… asked me to assist him in having the covenants removed… explained.. had an agreement... Synlait could make a 'backup offer'… to let Mr Ye out of the deal. I told hm that I was not interested and intended to honour my agreement… explained that I had concerns about what they were doing in breach of the covenants and suggested that they put the project on

hold until an agreement could be reached… not interested in that suggestion and Synlait continued to construct the plan in breach of the covenants.

Paragraph 14, "… I believe Synlait could have located its plant elsewhere… but the deposited aggregate resource exists only on the property."

So that's the background and if one looks, I'll just give you the reference without taking you to it, the letter at 303.1065 is the first letter that went to Mr Ye's solicitor on, I think, the 7th of May, and that was when he was overseas, but the agreement was already signed, and it didn't, none of the correspondence from the Stonehill solicitor identified what the property was to be used for, or identified Synlait, it talked about a neighbour, so Synlait masked itself under that title, or under that nomenclature.

Just across the page in our written submissions, paragraph 3.19 through 3.21, referring to Mr Ye's evidence, and there's two original briefs, two original affidavits, and there's an affidavit, new evidence in reply, I was going to take you to it but I'm conscious I've taken a fair bit of the Court's time. What he explains is that when he identified these properties or this property, he had actually looked at the property which Synlait subsequently bought. He regarded it as unsuitable for, because of steepness et cetera. When he identified this particular property he was interested in the existence of the basalt resource because he has plans for a much larger development in the immediate area and across the back of the hill, and if I can find my original plans I took you to, here we are, those photos, I can identify for you the extent of his holdings, which total some, I think roughly 500 hectares. If you wouldn't mind looking in the exhibit bundle, 303.1094. Now the hashed area, the extensive hashed area which at the top of includes this lot 3, which is the NZIPL land we're interested in, but that entire hashed area is owned by Mr Ye and his associated companies, and I think it's some 500-odd hectares. So when we talk about overburden, well there's plenty of room for overburden, but as he was describing in his evidence his intention is to develop that area down to the river for a destination resort and so first use for quarriable material would be to provide for roading into that area, and he also identified

the fact that there will be some further residential development likely, I think, in west Pokeno and he'd spoken to those people and they have an interest, it's no more than that, in the provision of aggregate from this quarry if it goes ahead for their development. Any subdivision development uses significant aggregate resources and, of course, the shortest distance you have to truck them, the less expensive it is and, of course, also much better on the environment. So he has a very, very, very significant financial interest in this area and the potential use of the quarry.

A lot was said in submissions about, well, he hasn't come along with any particular plans of that. Unsurprising, given the way that he was front-ended by the Synlait position on the covenants potentially affecting the development of the quarry and until that's put to one side then, as he said, designing a quarry, he's now learnt, is a matter of some complexity, but this is driven by that investment which he has there and which he's given evidence of the intention to develop.

The real estate agent, you've seen Mr Harris' evidence, he confirmed that Mr Ye was interested in the ability to use the quarry and the real estate agent has also provided an affidavit, confirms that. So it was a situation where he purchased in reliance on what was on the register and what he was told about the quarry resource and, as he said in his evidence, he paid more, significantly more than the valuation price of the land because he saw the potential for an immediate use of the basalt.

I won't, you'll be relieved to hear, go through what we've said in our written submissions in detail about the various legal considerations. I've discussed them reasonably generously. But our written submissions are more detailed than some of the discussion which I've had with Your Honours, but I think we've identified the essence of the position in respect of (a), (b) and (d). (c), of course, is the consent so that doesn't apply. And as I was emphasising earlier this morning, in my respectful submission, there's got to be a causative connection between whatever the change is and whatever the covenant, the covenant's purpose and the covenant provides for.

I don't think there needs to be anything much said about (e) and (f). It's unsurprising, in my submission, that the Court of Appeal did not dwell on (e) or (f). I don't think they were promoted by Synlait as being a basis for amending the covenants.

WINKELMANN CJ:

It seems unlikely since Ms Robertson didn't bring them to the attention of the Court. It was Mr Broadmore.

MR GALBRAITH QC:

Mr Broadmore brought it to the attention of the Court and there it lay, I think, Your Honour. I think that's the fact of it. And I do, with respect, adopt what was suggested my learned friend the other day that the Law Commission report is of some help in really debunking the idea that (e) and (f) were meant to be radical changes that were going to liberalise the regime. It was a reaction in the context of discussing covenants in gross or at least providing for covenants in gross which you couldn't have in the common law, and you certainly couldn't have on the register before, and so they identified really as a long-stop, I think is the way I would describe little (e) and little (f), as a long-stop if all else failed and there as some compelling reason why a covenant should be modified then you could potentially go to probably little (f) rather than little (e) because that's the for any other reason which is just and equitable. Little (e) I would see, in my respectful submission, as being significantly more confined , and as we've said in 8.4, for general public policy is to protect proprietary rights and maintain the sanctity of contracts, so it would have to be pretty significant in terms of public policy to overwhelm that general public policy consideration. And in our discussion of little (f), which starts at 8.5, we do note the decision in *Re Bell* [2019] NZHC 2725 where the Court considered it was just and equitable to modify a covenant because it served no useful but needlessly restricts the rights of the owner, and that, in my respectful submission, seems a perfectly proper exercise of the jurisdiction, but it's not to stand the provisions of 317 on their head.

Can I just say something about compensation, which hasn't been large in the written submissions on either side. There are three possibilities, of course, in respect of this appeal. The first is the appeal to dismiss, well that's not a problem, compensation doesn't come up. The other, or one of the others would be the appeal is successful and there's a modification in similar terms to that which Justice Glazebrook was suggesting to me. That appears to be the principal proposition by Synlait before Your Honours and it appears to have the possibility of some traction. Now the third possibility, of course, is that the appeal succeeds and the covenant just goes holus bolus. My respectful submission is that no justification being shown, given that there's an onus for that result. I take it it was in the context of that result that I was somewhat surprised to hear my learned friend say, well the question of compensation was determined by Justice Woolford below and is no longer alive for this Court. Our submissions in respect to the issue as to whether Synlait could be substituted or not, and in respect to the leave application, Your Honours no doubt won't recall but in those submissions we did deal with the question of compensation and said, well, if leave is granted then there'll be an issue of compensation. No point was taken by Synlait at that time, that there was some obstruction to that being considered. In fact my recollection is that that was at least tacitly accepted at the time, so I was a little surprised to hear that from my learned friend yesterday. The reason he can make that submission now is that what happened was that the, when the Court of Appeal overturned His Honour Justice Woolford's decision, to get rid of the appeal against his decision on the compensation, they struck that out, and there wasn't an appeal filed against the strike out for the obvious reason that the Court of Appeal had allowed the appeal.

WINKELMANN CJ:

Struck what out Mr Galbraith?

MR GALBRAITH QC:

Sorry, they struck out the appeal against the refusal of compensation by Justice Woolford.

WILLIAM YOUNG J:

They struck it out?

MR GALBRAITH QC:

I think, or dismissed it. Dismissed might be the right word Sir.

WILLIAM YOUNG J:

Yes, well they dismissed it because it didn't arise.

MR GALBRAITH QC:

I'm sorry?

WILLIAM YOUNG J:

They would have dismissed it because they didn't arise.

MR GALBRAITH QC:

Yes, that's right.

WILLIAM YOUNG J:

I don't have, for myself I don't have a problem with compensation being on the table.

MR GALBRAITH QC:

That's what I was going to say. If the Court now is going to exercise jurisdiction under 317 it seems, in my respectful submission, that 317(2) goes along with that because that's what section 317(2) says, if the Court does this then it can consider the question of compensation. So in my respectful submission, compensation is an open question if the Court does decide to modify because that's what the statute says and that hasn't been determined by Justice Woolford who wasn't determining modification and wasn't determining compensation in respect of Synlait either, was –

WINKELMANN CJ:

So Justice Woolford's decision that there should be no compensation granted was appealed by your client.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

And that appeal was simply dismissed because it didn't arise?

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

But you had submitted that compensation should have been awarded?

MR GALBRAITH QC:

Yes.

WILLIAM YOUNG J:

Well, you submitted compensation should be awarded if there's a modification.

MR GALBRAITH QC:

Yes. That's simply our position. Now the question is, with great respect, what does this Court do about compensation? I think probably the sensible thing is to send it back to the High Court but –

WINKELMANN CJ:

But have you filed evidence on it?

MR GALBRAITH QC:

No.

WINKELMANN CJ:

But why should you ever be able to then?

MR GALBRAITH QC:

The reason that there isn't any evidence on it, Your Honour, is really the reason that His Honour, Justice Young, just asked, has there been any discovery, because the compensation in respect of 317(2) has been recognised by the Courts, and I'll give you authorities, been recognised by the Courts to be assessed in similar terms to the assessment in relation to landlocked land. In other words, as being a balance between the benefit to the party who's getting access to the land in the landlocked land situation, and the detriment to the party who's giving the access.

WILLIAM YOUNG J:

There are two broad alternatives, aren't there? One would be compensation for the possible detriment of, to aggregate extraction ambitions.

MR GALBRAITH QC:

That's one possibility.

WILLIAM YOUNG J:

And the alternative would be effectively *Wrotham Park* damages.

MR GALBRAITH QC:

I'm sorry?

WILLIAM YOUNG J:

Wrotham Park damages. What should Synlait pay for the right to build a factory, to keep their factory on the ground?

MR GALBRAITH QC:

Yes –

WINKELMANN CJ:

What should Synlait pay for the right to have that covenant removed, yes.

WILLIAM YOUNG J:

Yes. No, but that's the – one calculation would be what a reasonable person's position, Synlait, who's no doubt committed tens of millions of dollars to putting a factory on the ground, pay for the right not to have it bowled.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

But I can't understand why you didn't file evidence on that point. Were you not given opportunity to file evidence?

MR GALBRAITH QC:

Well, not on that point, Your Honour, because the…

WILLIAM YOUNG J:

Synlait wasn't a party then, in the High Court.

MR GALBRAITH QC:

No, that's right. You remember at the leave hearing, I was arguing at the leave hearing that we should go back to square one, Synlait should file an application, we would have looked for discovery. We then would have had some information as to what Synlait were making out of doing what they were doing and we would have had some foundation. We've got no foundation to file evidence because we don't know what Synlait made out of two things. One is being able to build the factory there. Two is being able to build it without getting consent of the Court, in other words, jumping the gun. Mr Clement –

WINKELMANN CJ:

Is this – that doesn't follow.

GLAZEBROOK J:

I'm not quite sure why that's relevant anyway because the whole idea is that the covenant, if it is modified, that the covenant is no longer something that should be there, so why does somebody have to pay for doing what they could do quite legally if they'd waited?

WINKELMANN CJ:

And shouldn't you have argued that in the High Court anyway?

MR GALBRAITH QC:

Well, I'm sure it was argued. I wasn't there. I can't comment on that, Your Honour.

WINKELMANN CJ:

I'm just wondering why you should have a right to file evidence that you didn't file the first time round.

MR GALBRAITH QC:

Well, because Synlait wasn't the party. As I said, what I asked for, but failed, and that's fine, in the leave application was that we go back and start a proper new case for Synlait being the party and then we have discovery and we do all the right things, but Synlait, the evidence which is the new evidence, I'm sure I'm right, was before the Court at the time that the leave application was granted, and so that was the evidence we were proceeding on and I was saying that that wasn't enough evidence, but, in any case, the Court decided it was better to get on and do this and I'm not quarrelling with that.

GLAZEBROOK J:

Well, it would be very difficult, wouldn't it, to say it goes back with a case that says there's no modification? How could it go back and do anything when you've got a Court of Appeal judgment that says there's no modification?

MR GALBRAITH QC:

It was a different party, Your Honour.

GLAZEBROOK J:

It doesn't matter if it's a different party. If there's no modification, there's no modification. If anything, if you're right, there's less justification for Synlait then there was for Stonehill.

MR GALBRAITH QC:

Look, I lost that argument, I'm not quarrelling about that argument, but that was the proposition at the time. The point I'm trying to make is that unless or until there is some discovery from Synlait, it's impossible for Mr Ye, who is just, you know, just the purchaser of this other land that had these covenants, to have the information to present before the Court as to what might be appropriate.

GLAZEBROOK J:

As you can see the discovery the other way I can't quite see why discovery of Synlait is actually of any moment.

MR GALBRAITH QC:

Well –

GLAZEBROOK J:

I can quite see why discovery to see whether in fact Mr Ye has any intention of doing a quarry might be relevant to compensation but I can't quite see it the other way around.

MR GALBRAITH QC:

Well because the reason that Justice Young was just explaining that –

GLAZEBROOK J:

But if you're perfectly entitled to build what you like on that because the covenant shouldn't have been there, which is actually the point of the application, so if they succeed in their application – and if they don't succeed well of course we're not looking at anything in respect of a compensation, but if they do succeed and get rid of it, which says they were perfectly entitled to

build what they were entitled to build, I can't quite see why they get compensation for building what they're entitled to –

MR GALBRAITH QC:

They're only entitled to build it, Your Honour, from the time the Court decides that, but let's not quarrel about that. The received authorities at the moment, I'm not doing very well with received authorities, the received authorities at the moment are in a 317(2) situation you apply the landlocked land authorities, *Jacobsen v Drexel* and cases like that, where what you're trying to strike is a balance between, what I said before actually about economists, what an economist would say, if you want to get rid of something then you cut a deal somewhere down the middle of the benefits and detriments. Now I'm putting it very simplistically but that is what the authorities say and that's settled in relation to landlocked land and so far it's been applied in relation to 317 applications also.

WINKELMANN CJ:

Can I just take you back, because I'm having difficulty with the procedural side of your argument.

MR GALBRAITH QC:

Sure.

WINKELMANN CJ:

And it seems to me that all of those things should have been argued in the High Court, and you should therefore have a record in the High Court that you now bring up to this Court, but the record doesn't sit there in the High Court because you've got no evidence on compensation.

MR GALBRAITH QC:

I'm sorry. There was an argument in the High Court, which went up to the Court of Appeal, and that was dismissed, but that was in respect to Stonehill and the respondents here. There was than a substitution of Synlait. The issue then becomes what would, not what Stonehill, Stonehill was simply

a vendor of land. We now have Synlait, which is the party that by the sounds of it will be the successful applicant for a modification, perhaps, but let's assume it is because that's the only way compensation arises. We now have Synlait so that the consideration the Court should have is between Synlait's position and the respondents' position. Now since Synlait was given leave to be substituted as appellant, there has been no opportunity to file any evidence in relation to what the trade-off should be between the two parties, and it would be, I mean what material would the respondent have to identify what the incentives were for Synlait other than what Mr Clement has said in his affidavit, that Synlait continued to progress the development of the factory because it wanted to secure that first 12 months trading. Now that first 12 months trading would, in my respectful submission, be of some significance in a discussion, or a finding, about what compensation is appropriate between Synlait and the respondent as a trade-off.

GLAZEBROOK J:
I just can't understand the submission.

WINKELMANN CJ:
Can I put Justice Glazebrook's point a different way for you, which is this. It seems to me that I don't see how the benefits that Synlait is going to receive, the substitution of Synlait to me seems irrelevant to the issue of compensation because surely the only interest you have in compensation, your client has in compensation is the interest which is protected by the covenant, which is the ability to build the basalt, to do the basalt quarrying, so it's all within your ability, and the impact on that. So it seems to me that the measure of compensation must be linked to the legitimacy and extent of the interest protected by the covenant.

MR GALBRAITH QC:
Well with respect that isn't the way that the Courts, that isn't the approach in landlocked land, because in landlocked land what happens, you apply to see to get on the landlocked land and so the interest which is considered, two interests. One is the interested person who has got the advantage of the

landlocked land, sorry the access to the landlocked land, and the other is the detriment to the person who has given up that interest in the landlocked land. Now that's exactly the same position here.

WINKELMANN CJ:
Well it's not, but it's a different factual situation but –

MR GALBRAITH QC:
Well, it's a different factual situation but –

WINKELMANN CJ:
– you're saying you apply –

MR GALBRAITH QC:
– our Courts have applied the landlocked cases, the *Jacobsen* et cetera cases, to a situation where you're getting modification of a covenant. Because it's, with respect, the covenant maybe, it's a rather, excuse me saying this, rather an odd way to look at the legal right which the holder of the covenant has as being something they don't deserve to have, or the Courts now, you know, it wasn't a right they had, the Court now declares that there's going to be a modification. There's going to be a modification because they had a legal right and there's now some reason for that to be modified. It's the same, it seems to me in principle, with landlocked land, and that's certainly the way the Courts have seen that, but the idea that –

GLAZEBROOK J:
But with landlocked land it's just, I mean don't you actually look at – you're not going to say, oh well, actually the person who's got the land at the back is now going to have a five star resort on that land, and they should therefore pay compensation equal to the five star resort.

MR GALBRAITH QC:
No –

GLAZEBROOK J:

That's what I can't understand. I can understand that says well you look at what's been given up, and what you've got in return.

MR GALBRAITH QC:

Yes. Well that's all I'm saying –

GLAZEBROOK J:

But I don't see what the factory has got to do with that.

MR GALBRAITH QC:

Well because if all you were doing was a children's playground, you'd pay a lot less than if you're building a factory on the site so –

WINKELMANN CJ:

Perhaps you could take us to the authorities that say this landlocked land thing applies in section 317 because it seems – I'm rather perplexed by the notion that it requires Synlait disgorge somehow some windfall to the person who happens to have the covenant to protect one interest.

MR GALBRAITH QC:

Well one of the cases, I don't know how many Your Honour would want to go to, *Cambray*.

WINKELMANN CJ:

Is it in your authorities?

MR GALBRAITH QC:

No.

WINKELMANN CJ:

Is it in the appellant's authorities?

MR GALBRAITH QC:

No it's not. *Cambray North Island Limited v Minister of Land Information* (2011) 12 NZCPR 721, sorry, it is in the bundle of authorities. I'm sorry it is, tab 6. Sorry, that was in the Court of Appeal authorities. I'm sorry. I haven't got it in front of me either so what the submissions in the Court of Appeal set out was from Justice Wylie's judgment at [25]. "I acknowledge that the legislative provision discussed in *Jacobsen Holdings*," which is the one I was referring to, that's a judgment of Sir Robin Cooke's, "are similar to those contained in section 317(2) and I accept the general proposition that compensation under section 317(2), when properly payable, should fall to be assessed on a willing seller/willing buyer approach. In other words what would the owner of the servient tenement reasonably expect to pay for the extinguishment of the easement or covenant and what would the owner of the dominant tenement reasonably expect to receive if they are extinguished."

WINKELMANN CJ:

The problem I have with that approach is that it would incentivise opportunism, people hanging on to covenants that are no longer of any true value, they no longer have a legitimate interest in, but they can extract a price for it.

MR GALBRAITH QC:

That's true of any negotiation, Your Honour, where somebody wants something and somebody's got something, but at the end of the day, if the parties can't agree, that compensation can be set by the Court so…

WILLIAM YOUNG J:

Can I just step back a little bit? Say the appeal was dismissed, your clients could be expected to issue proceedings against Synlait saying, "We want an injunction making you pull this wretched factory down. In lieu of that we want damages." Now the damages, if it gets to damages and they don't have to pull the factory down, the damages would presumably be assessed on a *Wrotham Park* basis. I'm not quite sure whether the starting point is that there's a horrible factory there where there's a big sunk cost or whether you

assume a greenfield, what would you pay for the right to put a factory up might be less than what would you pay for the right not to have to pull a factory down. But these are the sort of…

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
Now that would be a legitimate approach to damages in the situation of (inaudible 12:26:40) where you've upheld the covenant and you're enforcing it.

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
I think where you're getting a little pushback from my colleagues is is that really the appropriate approach to damages where the premise of the exercise is that the covenant is one that ought to be modified anyway.

MR GALBRAITH QC:
Well, yes, in my respectful submission, that has been recognised as being the appropriate approach because otherwise you never get compensation because if you're going to say because we're going to modify the covenant, therefore it's not worth anything, then forget compensation.

WINKELMANN CJ:
No, no, that's not the point, Mr Galbraith, that Justice Young is putting to you. It's that where the covenant really doesn't protect any legitimate interest any more, so if it no longer protects legitimate interest you're not entitled to a windfall *Wrotham Park* damages type compensation.

MR GALBRAITH QC:
If…

WILLIAM YOUNG J:

Perhaps it protects a little bit of a limited interest –

GLAZEBROOK J:

Well, I think that that is the –

WILLIAM YOUNG J:

– but there's a huge disproportionality then you might get compensated for the impact on your legitimate, you know, the legitimate interest loss that's suffered.

MR GALBRAITH QC:

Sure, and – well, that's what I was going to say, that there is a legitimate interest and so that is why one ends up in the – that's an appropriate way of assessing compensation rather than just say because we're going to make a modification you get nothing.

GLAZEBROOK J:

But what's been put to you is that it's all on Mr Ye's side because if there is a legitimate interest still then compensation for whatever damage to that legitimate interest would be the appropriate measure of damages. That's what I'm suggesting to you.

MR GALBRAITH QC:

No, that's not the approach under the principle that His Honour, Justice Young, is speaking on or I've been referring to. It is a balancing and taking account of both sides, not just – it's not a damages claim, put it, it's not a – sorry, it is a damages claim of a type but it's not a damages claim of you've got to prove you've lost something. It's not a damages claim of that sort.

WINKELMANN CJ:

Isn't the whole thing best approach on a, without taking forward the *Cambray North Island* approach? Doesn't it have to respond to the basis on which the

covenant is modified? So, for instance, if a covenant has been bargained for and both sides get something out of it, and then six years later there's a zoning, there's some change which means that the covenant should be removed, then the compensation would have to reflect the original bargain which has been walked away from, but if the covenant hadn't – a covenant which, take another case, a covenant which no longer protects any legitimate interest is an antiquity and just a relic really, that there would be no compensation paid –

MR GALBRAITH QC:
Yes. I understand what –

WINKELMANN CJ:
– even though the removal of the covenant may hugely benefit the land that it's removed from so I don't, it's not, doesn't seem to me appropriate to look for, you know, to take across from one area of the law a measure of damages to another. It has to actually respond to the basis of the removal.

MR GALBRAITH QC:
I agree with Your Honour entirely. If the covenant was historical only and wasn't protecting anything that existed anymore, there wouldn't be compensation. But that doesn't mean that that's not the right approach to take. You've got to look at the particular facts as to what the right approach is to take. It's just like the covenant itself. This covenant protects a legitimate interest, recognised by Council in their zoning et cetera, et cetera, and if the Court takes the view, which it may do, that the balance is in favour of modifying the covenant, well it's the view the Court takes. But it's not to say there was no legitimate interest in the covenant, and there's –

WINKELMANN CJ:
Well there may not have been any legitimate interest left really is the point.

MR GALBRAITH QC:
Well that's not the evidence –

WINKELMANN CJ:

That's what's been said against you.

MR GALBRAITH QC:

– Your Honour, and with respect that was when Justice Woolford went wrong, and that's what the Court of Appeal corrected, that the evidence was that there is a legitimate interest because the existence of, the covenant protected absolutely the opportunity to develop the quarry land without interference from the covenanted land. So there was, with respect, a legitimate interest because there's still a quarriable source there. It's still zoned for aggregate extraction. The Council still recognises that in the way that they've gone about their zoning, and so to say it's, with great respect, no legitimate interest, that is inconsistent with the evidence with the evidence, and the evidence with the planners was yes, these are issues which could be taken into account in respect of an application to develop the quarry and it may affect the conditions et cetera, et cetera. So if the Court –

WINKELMANN CJ:

But the general proposition I put to you is that the compensation has to respond to the basis on which the modification or extinguishment takes place. You can't really come with a universal measure, can you, it just doesn't seem to fit it.

MR GALBRAITH QC:

But I agree with Your Honour, you've got to look at the facts. So as I say if the covenant is historical and has got no legitimate interest supporting it, I mean obviously I agree with that, but that isn't the situation here, in my respectful submission.

GLAZEBROOK J:

So what any modification would do, assuming we accept the modification now is just taking out the first one, that creates a risk that a quarry won't be able to go ahead, or have to go ahead on some modified conditions. It's slightly difficult to assess the damages there because we've no idea what the quarry

is actually going to do, but surely it would be compensation for that risk, or possibly even if that risk comes to fruition and only because of the actions of Synlait, whatever loss arises from that. I still can't see why it's anything to do with what Synlait would pay to get rid of it, that's all.

MR GALBRAITH QC:

Because Synlait succeeds in removing the potential obstacle which that would have to Synlait's factory construction. So Synlait is getting a benefit out of it. The covenants are being modified, they no longer, to whatever extent they're modified, no longer sit on the land on which they've built their factory, and so there's, using simplistic terms, there's a benefit on one side and there's a detriment on the other side because the absolute protection which the covenants provided for the respondent is gone.

GLAZEBROOK J:

But wouldn't you usually do that just on a market value basis. So it wouldn't matter if it was Synlait or Uncle Tom Cobley.

MR GALBRAITH QC:

No, no because –

GLAZEBROOK J:

You say you do it, so when you're doing it you're do it on an absolute applicant and the, because normally the market value of getting rid of those is the market value, and you don't usually take into account any special interest that people have when you're assessing damages, so why do you –

MR GALBRAITH QC:

That's right. That's normally but that's not the sort of damages that His Honour Justice Young is talking about or the sort of damages which is applied here. Your Honour is quite right.

GLAZEBROOK J:

So the reason you say that's applied here is because you apply landlocked land and you take the actual situation of the particular party as if it's a bargain between those parties to get rid of an earlier bargain. Is that…?

MR GALBRAITH QC:

Yes, that's, and English Courts they –

GLAZEBROOK J:

So they would still usually, or I would have thought, go for market value not taking into account the special characteristics.

MR GALBRAITH QC:

Well the market value –

GLAZEBROOK J:

So why do –

MR GALBRAITH QC:

Well –

WILLIAM YOUNG J:

Well it really depends. I mean it's a question of principle. You can either say what was the loss to the, what direct loss is it, what would be a market value or you might say, looking at the position of these parties, what would a negotiation have reached –

MR GALBRAITH QC:

Because there is no market. There is no market. The market is only the two parties, that's all it is.

GLAZEBROOK J:

No, I think that's a general market.

WINKELMANN CJ:

Yes, I think we've exhausted that point.

MR GALBRAITH QC:

Yes, I think so.

ELLEN FRANCE J:

Could I just check, Mr Galbraith, as I read Justice Woolford's decision in the High Court, Stonehill argued for the *Cambray* approach.

MR GALBRAITH QC:

Yes.

ELLEN FRANCE J:

But what the Judge said was, he didn't think that much turned on whatever approach you took, and that was because he assessed the extinguishment of the covenants, he said they were of little practical value.

MR GALBRAITH QC:

That's right.

ELLEN FRANCE J:

And he also noted that you hadn't produced any evidence to support the claim for compensation.

MR GALBRAITH QC:

I think that's, that's what he said. I mean he was dismissive of the covenants holus bolus and despite the evidence, which was that they had it, in effect, and despite the evidence the respondent he was relying on them so –

WINKELMANN CJ:

So the only basis, the basis on which we should take, you say we should take the procedurally unusual step were we to allow the appeal on the first point about modification/revocation, the only, the basis on which we should take the unusual step of referring it back to the High Court for the filing of additional

evidence, is the substitution of Synlait. That's the basis on which you say we should take that step? So you can file extra evidence.

MR GALBRAITH QC:

Well, because now we're into a modification situation where the statute says compensation and there hasn't been the opportunity to file evidence in respect of that. Because of the substitution.

GLAZEBROOK J:

Well I'm not sure the modification makes much difference, does it?

MR GALBRAITH QC:

Well that's why you get into 317(2).

WINKELMANN CJ:

Well you're in that extinguishment too, aren't we?

MR GALBRAITH QC:

Yes, that's right, yes.

WINKELMANN CJ:

So what is your answer to why we should take this unusual step?

MR GALBRAITH QC:

Because there hasn't been the opportunity since the substitution of Synlait to file that evidence, and if in principle we're right then that will require some disclosure from Synlait to file meaningful evidence, otherwise we're in the position of what Justice Glazebrook says, of simply filing evidence in respect of, you know, standard loss or damage.

GLAZEBROOK J:

Or market value of getting rid of that covenant, because, well to be honest it must be relatively easy to do, because the rating value assumes there isn't a covenant, and so that must be the market value without a covenant.

MR GALBRAITH QC:

I'm not sure about that Your Honour, but there is no market, there's only one buyer and there's only one seller and that doesn't a market make.

GLAZEBROOK J:

Well there's usually only one buyer or one seller of a house but you have a market value of that house that's based on the sales around the place.

MR GALBRAITH QC:

I'm not sure how I can apply that to this particular situation Your Honour.

GLAZEBROOK J:

That's only assuming that it's relevant, what Synlait is actually doing with it, rather than just getting rid of the covenant, but I understand the submission on that.

MR GALBRAITH QC:

Yes. So the last issue is costs. Synlait challenging the Court of Appeal costs issue. Two things about that. Again the cases have recognised that a section 317 application is not your normal run of the mill A suing B and in that circumstance it is said in *North Holdings* is an example of that where the subject is specifically dealt with by Her Honour Justice Katz. That in those circumstances indemnity costs and that should be paid and that simply costs following the event isn't the appropriate application, and then the second issue is the terms of the covenants themselves. As you'll recall my learned friend argued that because it refers to enforcement, direct or indirect enforcement, that defending a 317 application isn't either direct or indirect enforcement and the reasonably obvious submission in response is that it is effectively an enforcement step because it's defending the integrity of the covenants which, as His Honour, Justice Young –

WILLIAM YOUNG J:

Say it's completely unsuccessful –

MR GALBRAITH QC:
I'm sorry, Your Honour?

WILLIAM YOUNG J:
Say your clients had actually cross-claimed and sought an injunction in front of Justice Woolford, and the result of that hearing would have been the claim for an injunction would have been dismissed because the covenant was extinguished, would that – does enforcement include unsuccessful attempts to enforce?

MR GALBRAITH QC:
In my submission yes, it would, but if it doesn't come within the terms of the covenant then it comes within the terms of the principle that –

WILLIAM YOUNG J:
Yes, but you can see why it might be said, well, you didn't enforce it, the covenant, because you actually lost, that it may be that –

MR GALBRAITH QC:
Well, I agree with that.

WILLIAM YOUNG J:
Yes, so it may that within enforcement is the concept of successful enforcement.

MR GALBRAITH QC:
Maybe or maybe not. I mean, that's the interpretation. I don't think I usefully can say anything more on that and unless there's any questions I'm not sure I can…

Thank you.

WINKELMANN CJ:
Thank you, Mr Galbraith. Now, Mr Miles.

MR MILES QC:

Your Honours, could I just deal with this last point, the procedural point? I think the first and obvious point is that each of these issues were in fact argued in front of Justice Woolford. As Her Honour Justice France points out, when you go back to his judgment he specifically sets out the two tests that we've been talking about and cites *Cambray*, the very case my friend says is a leading case for the proposition that you actually take some of the benefit of the successful party as part of the compensation. That proposition, that was argued before His Honour. *Stonehill*, of course, argued that that was inappropriate, that you looked at whatever costs might legitimately arise out of a modification, and His Honour was quite entitled to say, well, on the facts of that case as advanced in front of him there was little practical difference. His conclusion that the covenants no longer provided any practical assistance any more was a view that he was entitled to find on the facts. Of course, it's a view that we've been advancing very seriously over the last couple of days.

But one of the issues, of course, he points out is that there was no evidence that was filed other than the hypothetical evidence of the experts that, yes, there might possibly be some effect if there was a decision finally made to go for a quarry, if there was a resource management application made, and yes that could possibly have some effect. They, of course, could have run the further evidence and in those circumstances the mining engineer says it is inevitable the following costs will be part of the deal. That was open to them then, and they chose not to call that evidence. They also, Your Honour, on the issue of that first test, are we entitled to take some slice, if you like, of the economic benefit to the applicant as a result of being able to modify the covenant, they actually sought to have Stonehill produce the agreement for sale and purchase with Synlait, which presumably would have then led to the argument, well, Stonehill has on sold the land for X dollars and that the reason that a significant profit, which may or may not have been made, was perhaps because of a confidence that the covenants would be removed, or whatever it might be, and the Judge declined the order, and he was quite entitled to do that, and presumably that was one of the basis of the appeal, and these issues were argued again in the Court of Appeal. There was no determination

in the Court of Appeal, of course, because Their Honours felt it was unnecessary and dismissed the appeal.

Procedurally the logical step then for NZIP as a consequence of getting the application for leave from Synlait, would be it apply to cross-appeal for leave to argue that point as well, and at the very least to make it a term of granting leave to Synlait, and when you go back to the orders made by this Court granting leave, there's no reference at all to this issue. It simply wasn't included as part of the deal. So it's simply too late now to come back and reargue the issue when they had all the opportunities to argue the evidential issues back in front of Justice Woolford and the opportunity to reserve their right in the event that ultimately it was needed to be looked at again, and there is some genuine prejudice to Synlait facing a proposition that in the event that the appeal today is successful, they then have to go back to the High Court to put up with possibly days and days of technical evidence dealing with so-called compensation, when they've already had to go through that the first time. I mean that – let me rephrase that. When, and I think it was Justice O'Regan , when we had that conference a month or so ago when the hearing was put off, and I made one of those pleas that counsel do now and again where I said that this issue is actually having a genuine commercial impact on Synlait. It is quite important, Your Honours, and if I just make it again while I'm on my feet, Synlait has asked me that if Your Honours could reach a decision as soon as obviously you can, they would be grateful, but as part of that there is a genuine need for these issues to be determined, and the idea that then, Synlait has to go back to the High Court for a dispute that in theory anyway could continue for the next couple of years. So for all these obvious reasons enough is enough.

So that was, all I was planning to say on that issue Your Honours. I do have five or six points on the more substantive issues and I will probably need somewhere between 30 and 45 minutes to deal with that Your Honour. So I'm happy to start on that now.

WINKELMANN CJ:

Well we may as well start.

MR MILES QC:

Yes. Let me deal with two or three lesser points, if you like, before I get into the really substantive issue about the context and meaning of 317. The first relatively minor, Your Honours, but my friend did make the point that there was very little, if any, further land available to Synlait other than the land covered by the covenant, and you may recall he took you to a report, I think, from Grierson who are the experts in that area. Could I just give you the reference? It's 305.1514. When you go to that report even they said there's 15 hectares of the 28 which is developable. So seven or eight, what, 7.2 or approximately of those hectares have been utilised now. There's another seven or eight hectares to be used for further development if necessary.

The next point, which is a little more significant, and that's this issue of the letter from Buddle Findlay to Stonehill's solicitors in 2018 threatening proceedings. Now I just want to take you to it because there is a relevant couple of points arising out of that letter. You'll find it at 303.1096, Your Honours. That's the letter dated 19 June 2018, and paragraph 3, "It has come to Mr Ye's attention that earthworks are taking place on the servient land, in breach of the covenants. Mr Ye demands that all work on the servient land that is in breach of the covenants cease. If the earthworks in breach of the covenants do not immediately cease, then Mr Ye may seek Court orders enforcing clause 1 of the schedule…and to recover any damages from Stonehill." In other words, threatening injunctions. Now I quite understand, Your Honours, that there might have been some concern about interim injunctions given the potential economic loss in the event that the injunction was ultimately discharged but there was no reason at all in these circumstances why an application for a permanent injunction shouldn't have been issued and consolidated with the application which had been filed about a month earlier, about the 23rd or 25th of May. So that option not only available but specifically recorded in the letter as an option that they were considering.

At paragraph 4 they say they also intend to oppose Stonehill's application for orders extinguishing and modifying. So they recognised then the distinction between injunction proceedings to enforce and opposing a 317 application, and quite apart from the issues that I think Justice Young raised which had some relevance to these points. This also is an example, I think, of what my junior was talking about when she was saying that the indemnity costs issue recognised the distinction between enforcement action, injunction, et cetera, and opposing an application to modify.

Now, third point. There was some discussion that my friend had with Your Honours on the knowledge that Mr Ye had of Synlait's purchase of the land and the subsequent activities by Synlait and the suggestion was, and I think you were taken to some correspondence with the solicitors, the suggestion was Mr Ye was unaware of Synlait's involvement, and was unaware of what Synlait had been doing at the time he signed the agreement I think in early May. Can I just take Your Honours to a couple of affidavits. First the affidavit of Mr Ye, and you'll find that at 201.130. It actually starts at 127 Your Honours. Now from paragraphs 8 onwards he really discusses, obliquely perhaps, but nevertheless discusses his involvement and knowledge of what was taking place. Now if you go to paragraph 11 Mr Ye says, "During the 10 days' due diligence period under the SPA, I investigated the potential for the site to be used as a quarry." Now Your Honours Mr Ye actually is wrong on that. If you go to the agreement for sale and purchase and I'll just give you the reference, you don't need to go now, but the reference is 303/994, and you will find there that the due diligence provision in the agreement has been deleted.

WINKELMANN CJ:

It's put to him in cross-examination isn't it? It's put to him in cross-examination?

MR MILES QC:

Yes, right. So what Mr Ye, I'm not criticising Mr Ye, I mean obviously he went back, that's what he was under the impression was the case. He did, of course, however, undertake due diligence, but the due diligence was undertaken prior to signing the agreement, and I'm going to take you to the affidavit that confirms that. But just before I do, at 14 and 15 you really get a sense that he was unaware of what was happening, but nowhere in this affidavit does he actually say, I was unaware of Synlait's involvement and these covenants and what Synlait was planning to do, really, until 1 June when he met Peter Bishop. Now if you go to Ms Guo's affidavit, the land agent, and you find that at 202.0272. Now this, of course, is the respondents' affidavit and she was working for Barfoot & Thompson. She says at paragraph 2, in 2017 I met Mr Ye when he was interested in buying land. Paragraph 3, in February 2018, I sent him information in relation to the land, the 88 hectares, which of course he subsequently bought. At 4, which is really the interesting paragraph, "Around late March early April 2018, Mr Ye and I undertook an initial inspection of the properties. I recall that during the inspection Charlie Harris of Havelock Bluff Limited advised us that the properties had the benefit of several covenants that protected quarrying on the land." He showed strong interest, et cetera. So he visited the land in late March and early April and what we know from the, and you can just pick this up in the chronology Your Honours, is that Synlait began work on the land on about the 19th of March, the earthworks began and continued from that time on, and the obvious inference from this is that Mr Ye must have just looked across the paddocks, down the road to where Synlait was building, was beginning to develop the factory, and must have been aware of what was happening. Now in the big picture, Your Honours, this is not going to determine the outcome of the appeal, but it is an element, as I said in my original submissions, it's an element certainly that you take into account when exercising a discretion. That in May when he signed the agreement he, I would suggest, was aware of what was going on. Certainly when he finalised the deal on the 1st of October, say it's all history by that stage.

Your Honour that might be a convenient time, and as I say I would anticipate another 30 to 40 minutes.

WINKELMANN CJ:
We'll take the adjournment now then.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.17 PM

MR MILES QC:
Your Honours, I just want to discuss briefly my friend's submissions on the proper construction of 317(1)(a), in particular, I suppose, (a)(i), whether it's been established that the use being made of the benefited land or the burdened land is sufficient to justify modification. The reason why it will be brief, Your Honours, is that the issues were really thrashed out in considerable detail by Your Honours and my friend this morning, but because of his reliance on *Jansen v Mansor* I just wanted to take Your Honours briefly to that case just to explain why in our submission it's an entirely orthodox approach of each of the relevant grounds which we're talking about today. Just before I do that, could I –

WINKELMANN CJ:
Is this about the relevance of zoning?

MR MILES QC:
Sorry, Ma'am?

WINKELMANN CJ:
Is this about the relevance of zoning?

MR MILES QC:
Yes, or lack or the suggestion that zoning in some – well, the real suggestion, of course, is zoning had no impact at all, that because *Jansen v Mansor* didn't deal with zoning somehow that was in a category of its own but somehow

supported the proposition that zoning per se was an irrelevance. What would have become apparent, I think, over the last day or so is that zoning, of course, is highly relevant because inevitably it will have some impact on the appropriate use of the land, either to the greater detriment to the subservient owner or reducing the benefits to the dominant owner. But just before I go to *Jansen v Mansor*, would Your Honours go to paragraph 79 of the Court of Appeal judgment in blue volume 27? They set out a citation from *Hinde, McMorland* in quite some detail and while my friend didn't discuss this in any detail I got the impression from his written submissions that he'd certainly support it, and I have no difficulty really with that first extensive paragraph where the learned authors say, sort of five or six lines down, well, actually three lines down – sorry, is this paragraph 79? Have you…

O'REGAN J:
Yes.

MR MILES QC:
Yes. They say, "The change is most likely to be relevant if it has altered the benefit or disadvantage resulting from the continuance of the easement or covenant." Not a prerequisite but, "The most common justification…would be evidence that the relevant advantages and disadvantages flowing from the covenant have become totally disproportionate by reason of changes which have occurred," and I think that's a helpful statement of the law. My only quibble would be the phrase "totally disproportionate". I would have thought "disproportionate" would have been enough given the whole structure of section 317. So if we take that as an acceptable statement of the law.

Then seeing how it tends to be adopted in practice, if we could go then to *Jansen v Mansor*, that's tab 3, I think, in my friend's bundle, and you'll recall this was the case where there was a sort of standard covenant just saying that you can't put a second storey on your house, perfectly standard sort of covenant. Now Justice McKay, at the bottom of page 16 in the judgment, said, "No doubt one could approach the application of the section by the two step process suggested, but the real question in para (a) is whether, by

reason of any change of the kind mentioned, the covenant should be modified. The focus is not on the fact of change, but rather on its impact from the point of view of making it appropriate to modify the covenant," and that again seems a helpful statement of how one approaches paragraph (a).

And then in the next few paragraphs His Honour just made a series of really factual conclusions saying, well, back in 1958 what was obviously in contemplation was the possibility that a single storey residence would be turned into a two storey. That's the sort of change that could be anticipated, that that's – and deciding that there's been no change of the sort that would modify the covenant, and of course you wouldn't because it was precisely that reason why the covenant was actually drafted in the first place.

The lengthy quote from the trial Judge which makes the point that the Judge actually visited the neighbourhood and determined that there'd been no real change in the neighbourhood, just exactly what you'd expect, and His Honour went on to say, just at the top of the second column, he said, "No doubt there have been changes in the neighbourhood, particularly in housing density," but the nature of those changes can't justify modifying the covenant. "The position would be quite different if, for example, a row of high rise buildings nearer the sea front already effectively blocked the respondents' view of the harbour." I suppose if you were using that as an analogy for the facts today you would say, well, if, for example, two or three milk treatment plants were actually built around the edges of the relevant land, having the effect of effectively removing the efficacy of the covenant, then that's exactly why and when His Honour would have said yes, that is indeed different and that is indeed a legitimate basis for modifying the covenant.

And then, when looking at paragraph (b), the issue of the reasonable user of the land, far from being an example of my friend's suggestion of how this clause should be construed and, as I understood his argument, it was something along the lines that one looked not at the different use of the land but rather whether the covenants had been changed or not, and of course the covenants are never changed. The whole point of (b) is to cover a situation

where sometime in the future the use of the land has changed and there's now an alternative reasonable user which wasn't anticipated at the time, and what Justice McKay simply said here is that's exactly what you look at, but, of course, it would have been anticipated that someone might put a second storey on it, so, of course, it doesn't. You can't come under that particular category.

So far from, say, suggesting that the construction put forward by my friend is supported by this judgment, I would say, Your Honours, that it was an entirely orthodox approach picking up on the view that we've expressed and in conformity with Justice Katz in *North Holdings*. Let me –

WINKELMANN CJ:
So Mr Galbraith says, well, at the time this covenant was put on someone might put a dairy factory on it because it was a conditional use for rural land.

MR MILES QC:
Can I answer it this way, Your Honour? When you're looking at (a) I think it's helpful to look at what exactly the covenant was designed to deal with. Now we know we had Winstone's with 150-odd hectares determined to turn that into a quarry and this tiny little nine hectares of…

WILLIAM YOUNG J:
Rural bliss.

MR MILES QC:
And so, but it could be awkward for them in the event that they had to apply for a resource consent. Now we know they had to apply. So that was the reality at the time. Winstone's wanted to deal with a potential opposition to a resource management application. Now they had, they filed that and they got that in about 2002, let it lapse as we know by 2009 and decided to subdivide the land. Looking at the position now, what function does the covenant have? Its only function is in fact the identical one that it had in the first place. The new owners of the land have to file a resource consent application before they

can quarry the land. What they're now faced with is not just Synlait with the covenants, they're not facing the identical opposition that they would have had from Synlait, from Yashili and from Winston Nutritional, and that has resulted directly from a change of zoning which has permitted those two factories plus the Hynds factory to be built on the periphery of the land. So it is inextricably linked with zoning. The causative effect, if you like, or to use the phrase that my friend adopted, on the covenants, is directly linked with an issue which is part of the use of the land now.

So that's what we say. That's the rationale for what we say is the reason why we would be entitled to have it modified, even under the first ground.

As I understood his second, his argument on the reasonable use, the effect of my friend's construction, of course, is to set the covenant in concrete really in perpetuity otherwise, he said, of course, it's just contingent on subsequent events. And of course it's contingent on subsequent events. That's what section 317 is about. It's about contingent events. They might be anticipated in which case you apply under (a). It might be unanticipated and then you'd go under (b), and then there are the other grounds as well. But that is exactly why that section is there.

ELLEN FRANCE J:
It's not just any subsequent event, is it?

MR MILES QC:
No, of course not, Ma'am. I was using a broader brush.

ELLEN FRANCE J:
Well, I think you are moving away from the link with the covenant.

MR MILES QC:
There has to always be the link with the covenant. I accept that. But there has to be a contingent event, I suppose. It was really that proposition that I

was saying that inevitably it is contingent on events but, of course, they have to be linked with the covenants.

Now my friend then sought, I think, to distinguish *North Holdings*. I can only say, Your Honour, that my respectful assessment is that that is a judgment just sets out quite carefully and accurately the appropriate tests under (a) and (b). Your Honours may have picked up that she didn't believe that the zoning actually was enough to justify a change under (a). What she did think though – and similarly the neighbourhood. She didn't think the neighbourhood had changed either. Of course, it hadn't because it was just one subdivision. It just hadn't succeeded. She did think the zoning came in the other circumstances, (iii), and we would say we would agree with that in our case although we have the advantage of being able to say it comes under the first two categories as well. And, of course, that case was then followed by Justice Gault as well in that further case that I handed out.

So Your Honours, that was all I was planning to say on the applicability of those grounds.

ELLEN FRANCE J:
Could I just ask, Mr Miles, you were reasonably dismissive of the Court of Appeal's reference to property rights and the sweeping away of property rights, but thinking about that further, given that the same test applies to a range of instruments, including easements, including, say, covenants under section 278 in a subdivision that roll on, isn't there something in the notion that these are property or proprietary rights and so there should be some caution before they are, I don't want to use the word "swept away" but I can't immediately think of anything else.

MR MILES QC:
Well, I just keep coming back to the section itself, Ma'am, and the section sets out very specifically, and you know as we know gradually expanding the grounds, and I just don't get a sense when you look at the way that section has been developed over the years that one should add anything further or

read anything more into those grounds other than what is there, and I still consider that a covenant really is essentially an expression of private rights between two individuals who, because of the nature of the agreement, are able to register on the land, and hence one wouldn't approach it with any more or less caution, I suppose, than construing any other contract, and given that Parliament has recognised now that the types of circumstances, I suppose, that now exist and have obviously become more complicated and more common, that the Court should in their judgments reflect that easing rather than reinforcing, I suppose, that overly conservative bent that I suggested can be found in the judgment. So a rather longer response, Ma'am, than maybe you anticipated but that's how I would see it.

GLAZEBROOK J:

It is a fairly standard, well, no appropriation without compensation, but we now have compensation, but it is fairly standard to have a view of property rights and property rights can arise out of a contract and especially here where it's registerable. So wouldn't it, I think as Mr Galbraith was suggesting, just be one of those sort of fundamentals that you would usually use to interpret a statute anyway? It doesn't mean it has the sort of effect that the Court of Appeal has indicated but really probably just reiterating Justice France's question. Is it something you totally disregard and just look at it as a money issue?

MR MILES QC:

No, I wouldn't go that far. I don't think for a moment you totally disregard it, Ma'am. I think clearly it is a property right and that it will not be set aside unless a Court is satisfied that it ought to be. For myself, I wouldn't go further than that, and I think the theme, I suppose, running through our submissions is that the judgment that Your Honours will be delivering is an important one because there has been built up a whole series of additional principles and propositions by High Court and Court of Appeal judgments over the last 40 years that, when added together, has gone a long way towards nullifying what Parliament intended, and that permeated through the judgment and inevitably then affected the decisions based on the actual grounds.

WINKELMANN CJ:
The law has always been quite hesitant about agreements that run forever, hasn't it, private bargains, protective in relation to them, so it is quite unusual for statute to give you the right to mess about with people's private bargains.

MR MILES QC:
Yes.

WINKELMANN CJ:
So in a way you could say that's the countervailing. This is statutory recognition of the need to relieve against long term bargains.

MR MILES QC:
Exactly, Your Honour, and when you pick up, and we did touch on this in one of the paragraphs in our submissions, that prior to the 2008 amendment bringing in the right to compensation there were two or three statements by Judges, mainly in the first instance, who were reluctant to modify covenants because there was no compensation, and you can quite see why those judgments may have had an impact eventually on Parliament and wishing to introduce that further provision.

Just while I'm on that, by the way, Your Honours, and coming back to that issue, that slight disconnect, I suppose, between the fourth ground, you know, has there been significant impact on you and how does that fit comfortably with the compensation issue?

The one further point I would make, which is an obvious one, I suppose, but I think it is worth making, ground (d), the modification won't substantially injure any person entitled, that has always been one of the core grounds. I think more or less in that form it was in the 1952 section. So that's been around from day one. The compensation amendment which came in in 2008, of course, came in, what, 40 or 50 years after that ground was first included, and I think I'm entitled to say that Parliament would have recognised that those earlier grounds all had to be part of the new regime so that even if there was

substantial damage then compensation would still be appropriate, if compensation could be properly assessed, and that's why I thought there was a legitimate distinction between economic loss and when you go back to, we go to the judgment, I think it's round about paragraph 115, 116, the Court specifically said this is just economic loss. It also said effectively it was pretty hypothetical but we've discussed all of that and I'm not going to get into that again. So even if we fail to establish the proposition that there's in fact been little or no damage, if you like, as a result of extinguishing the covenant, because they no longer have any useful function, just suppose we didn't get that far, then these are economic issues that could properly be taken into account if it was thought that there was anything there to compensate.

Just two further points. I thought it was helpful my friend taking you to the affidavit by the ex General Manager of Yashili who pointed out in the last couple of paragraphs or so that Yashili will certainly oppose any resource management resource application on the obvious grounds, the precise grounds that Synlait would have used in the event that they hadn't given the undertaking. So I think it was, Ma'am, I think it was you or the President made the point, so they're the opposition, and, of course, they are, but that is simply about the best evidence we have. That is exactly what is going to happen in the possibility that NZIP will ever apply for resource consent. It's just the final confirmation really that the covenants just no longer perform any useful function.

The last point, the undertaking. I thought it was a little unfair, you know, of my friend when criticising sort of the fine details, if you like, around the edges of the undertaking but actually didn't point out that the letter that was sent by Synlait to NZIP, and I'll take you to that, but the letter setting out the terms of the undertaking specifically said, "Look, we're willing to talk about these issues. If you have any suggestions or amendments or whatever come back to us." Now I'll just take you to it. It's 305, Your Honours, 305.1495.

Now I just invite Your Honours in due course to read the whole of the letter. Really it's a letter saying we see ourselves as good neighbours, we want to

help and we just want to work these issues through with you. They set out the undertakings and assurances at the bottom of that letter and over the page, and then on the second page they say, “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,” and then at the end, “I look forward to a response from you that reflects our friendship, and a willingness to resolve these issues in a mutually beneficial way.” Well, they never got a reply. Now, that’s all right, NZIPL doesn’t have to reply but it’s a bit rich not having replied to then say to Your Honours that the undertaking itself isn’t as effective as it might be or that there are other elements about it which won’t work. What is clear is that Synlait set out as best it could to give the widest possible assurances that only will it not object, which, of course, was part of the original covenant which it’s prepared to live with, but it would actively support the application which is a significant additional feature, and what I say from the Bar, Your Honours, is that if there are any minor procedural issues that just need to be added to the assurances already set out in that letter then of course we will give them, and I wonder whether a way through this might be that if Your Honours allowed the appeal, and then the issue becomes what are the precise terms that would be appropriate for an undertaking. That if it was thought that any further tweaking of some sort might be appropriate to the assurances already given, then say so and the parties, perhaps give leave for the parties to file a memorandum just recording the precise terms that the parties hopefully can agree on, given the terms of the judgment, and if not, the differences will be, I would think, relatively minor, and Your Honours could determine that should it be necessary.

WINKELMANN CJ:

So Mr Matthews said you need a written approval really.

MR MILES QC:

Mmm.

WINKELMANN CJ:
And you can't give a written approval when there's no application.

MR MILES QC:
But we can give an assurance that were an application to be filed, we would give whatever approvals were necessary in the context of the undertakings we've given, and I think there was another criticism that if this wasn't going to be a modified form of the covenant, then it wouldn't be binding on other parties, but if Your Honours determine that the most appropriate way of dealing with this is to amend the covenants, then of course that would deal with that issue as well. I can't remember whether there are any other material, anything else that was significant, but if there is, Synlait will do whatever is necessary to provide, to ensure that the parties get the full benefit of the undertakings that they are giving.

Just the final point Your Honours, that memorandum which was mentioned last night by the purchasers of the Grander land by the Hynds Foundation, that has been signed and filed in this Court so that procedural issue has been sorted through.

WINKELMANN CJ:
Thank you Mr Miles.

MR MILES QC:
So unless there's anything else Your Honours, that was all I was planning to say.

O'REGAN J:
Is there anything more you want to say about the admissibility of the new evidence. I mean we've gone through it in quite a bit of detail now, it seems a bit artificial not to accept that, but do you have a view on it?

MR MILES QC:
No Your Honour.

WINKELMANN CJ:

Thank you very much Mr Miles. Thank you all counsel for your very helpful submissions. We will take some time to consider our decision.

COURT ADJOURNS: 2.48 PM