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

SC 50/2019
[2019] NZSC Trans 28

BETWEEN **STONEHILL TRUSTEE LIMITED**
Appellant

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

YE QING
Second Respondent

Hearing: 21 October 2019

Coram: Winkelmann CJ
Glazebrook J
O'Regan J

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

CIVIL LEAVE HEARING

MR MILES QC:

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

WINKELMANN CJ:

Mr Miles.

MR GALBRAITH QC:

If the Court pleases. I appear with David Broadmore for the respondents.

WINKELMANN CJ:

Mr Galbraith. So Mr Miles. You've been told 45 minutes but we thought that would be very much the outside what you'd need, and that we'd just run through rather than having a morning tea break.

MR MILES QC:

Yes, I understood that Your Honour, although I was conscious that I was going to have to cover a certain amount of ground, albeit at a relatively high level, so if I'm a bit once over lightly on occasions Your Honours will forgive me.

The first area that I plan to discuss might take 10 or 15 minutes, would be the errors that we say can be found throughout the judgment. Secondly, I will touch on the grounds, of course, for granting leave, then thirdly, there's the evidential issue, and tucked away in that, somewhere along the line, will be the fact that two key grounds, which were part of the, which were the 2017 amendments, that were never referred to either in the application in the High Court or indeed in the Court of Appeal, other than a brief reference by Mr Woolford *[sic]* when he got to his feet as it were at the start of the appeal, mentioned, so we're told, to the Court of Appeal that these 2017 amendments had taken place. Having done that there was no further reference, even though they are two significant amendments and, of course, were part of the law at the time the appeal was heard.

Well Your Honours the written submissions which I will just have in front of me when I deal with these issues, talk about initially the changes that have taken place, particularly to the benefited land between 1998, which was the date of the first covenant, and 2012 when there was a significant change in the zoning, and 2018 when the application was made to extinguish the covenant. The fundamental changes, which are set out at page 2 and 3 of the submissions, I think are these Your Honours. Back in 1998 and 2000 the land was all rural. It was a little, it was a small bucolic village, 200-300 people surrounded by farms. It was a small area, this 28-odd acres, that was a lifestyle block surrounded by Winstone's land of about 140-odd hectares, all zoned rural, but Winstone had a discretionary right to excavate and they wanted to sort out the owners of the 28 hectare block and to ensure as far as possible they wouldn't object. So that was the basis for the covenant. By 2012 the whole area had undergone a fundamental change that could never have been anticipated back in 1998. The 300-odd had moved to somewhere between 3000-5000. The land had now been zoned commercial, industrial, and it was now 80 hectares set aside for industrial land. Now that had already been taken advantage of by a grouping of factories in the immediate area, particularly, as it happened, a couple of factories as well as Synlait dealing with milk production, so you had Yashili literally next door, just a few metres away from Synlait. They're planning to expand further west. Your Honours have got this photo, haven't you?

WINKELMANN CJ:

Yes. It's attached.

O'REGAN J:

We've got a smaller version of it.

MR MILES QC:

Let me give you, Your Honours, a bigger one, because it's just a whole –

WINKELMANN CJ:

This is the one that's attached to your submissions.

MR MILES QC:

That's the one, yes.

WINKELMANN CJ:

A bigger one would be appreciated though.

MR MILES QC:

Yes, and you'll see Yashili is planning to expand west adjacent to NZIP's land, that's the big chunk of land to the left, to the west, with the dotted white lines. The green line is the Synlait land and next door you'll see Yashili and just to the north-west is Winstone Nutritional, that's another factory planned too, as a milk production plant.

WINKELMANN CJ:

So applying my left and right as opposed to east and west, all that land which is marked NZIP out to the left, does that have, is that the dominant land or does it not have the benefit of the –

MR MILES QC:

That's the beneficial land.

WINKELMANN CJ:

Yes, so both to the – so the white dotted land both to the left and the right has the benefit of the…

MR MILES QC:

No, no, just to the left.

WINKELMANN CJ:

Just to the left.

MR MILES QC:

That's all NZIP land. That's about 80-odd hectares I think of NZIP land. The green land is all Synlait. The land with the red delineation, that's the eight hectares –

WINKELMANN CJ:

The servient land.

MR MILES QC:

Which, burdened land, that Hynds factory to the right was part of the Winstone 140 hectares but that, and was part of the benefiting but that got waived, I think, and so Hynds now are just running, I mean it's purely industrial.

WINKELMANN CJ:

So are you saying the Hynds land was dominant land?

MR MILES QC:

Yes. But that's, it was waived anyway, so that's no longer a factor Your Honours. So in a big picture what we now have is not only 80 hectares of industrial land, but we have Synlait, Yashili, Winstone Nutritional, all three factories now all within a seven iron's distance and Hynds just to the back. So the, again, big picture, what we have is a fundamental change in the neighbourhood and a fundamental change, and this is under 317(1)(b), a change in the reasonable use of the land that couldn't have been anticipated back in 1998, and the reasonable use of the land now, of course, is the way that the local district council has said the land should be used, which is commercial, and as a further consequence, and this goes to the benefit an disadvantages of both the beneficial land and those that are, and sashimi – sorry.

WINKELMANN CJ:

Yashili.

MR MILES QC:

And Synlait.

WINKELMANN CJ:

Oh Synlait?

MR MILES QC:

Yes, Synlait.

WINKELMANN CJ:

That's an unusual one Mr Miles.

MR MILES QC:

Yes. Synlait are suffering from this. That when you look at the impact that the change of zoning has had on the covenant we have Synlait locked in now to a 200 year covenant restricted to grazing and lifestyle farming, which were appropriate 20 years ago when the whole area, the land was zoned rural, that was indeed a legitimate use of the land. Since 2012, when the land is now zoned industrial, that use is now non-complying.

WINKELMANN CJ:

So what do you say to the proposition which I think is implicit in the respondents' submissions, that well that's the deal that Synlait did, it bought this land which had this zoning and this covenant.

MR MILES QC:

And what one's entitled to do then is to look at the grounds on which you can apply to extinguish the covenant. You can say on a dispassionate, objective analysis has the character of the land changed so much, so significantly, that it's now appropriate that the covenant should be removed. What the Courts have done over the years, and really culminating in the judgment we're appealing from, is a whole series of, as it were, sub-principles, which the Courts have sort of encrusted, in a sense, to the exercise of the discretion in the way those grounds should be dealt with. When – and the judgment from about paragraph 70 through to about 115 far from being just statements on the facts, as suggested by my friend, they're actually a series of principles which they say the Court should take into account. Firstly, a fundamental attitude, which is to be conservative, and that you should only apply to extinguish these rights on "very strong grounds". Then they set out a series of principles that you either should or should not, or propositions, the Court

should or should not take into account. It is clearly seen as a definitive statement on where the law stands in 2018, and with all due respect to their Honours, there is a systemic series of what we would say are significant errors, and I'm going to take you through very briefly to those errors Your Honours. I'll try and do this in about five minutes.

Now if you take the judgment itself, if you go to paragraphs 73 and 74, 73, Your Honours, talk about the traditional conservative approach in exercising discretion. There's good reason, because you're dealing with property interests. Well I have no difficulty with that as a broad proposition. But at 74, and this becomes the key section here, they quote *Luxon v Hockey* (2004) 5 NZ CPR 125 and *AFFCO New Zealand Ltd v ANZCO Foods Waitara Ltd & Ors* HC Wellington CIV-2004-485-499, 23 August 2004. Now the significance of both of those cases, Your Honours, is that both took place prior to 2008. Now the reason why that's significant is that the Act, which by the way started in 1952 in the Property Law Act, that's where the first revision took place. There was a major amendment in 1986 when basically 317 is roughly the same as the 1986 amendment. Then that amendment was significantly altered in 2008 when they brought in the right to provide monetary compensation. Key element in extending the grounds for extinguishing and loosening the discretionary approach. So any judgments prior to 2008 have to be treated with some reserve. Then, of course, the final and significant amendments in 2017, which added the public policy issue and under (f) widened the discretion to probably the ultimate form of discretion you can have, just and equitable grounds. So when you look at paragraph 74 firstly they adopt *Luxon v Hockey* I think a 2004 judgment, and then *AFFCO*, which is 2004 again, and where they talk about, well you can't change the covenant just because it suits you. Well no one for a moment would apply on that basis. That's just a given.

"(ii) the length of time between the imposition of a covenant and the application… is a relevant factor." Well why should that be the case Your Honours? If, just to take an extreme example, just suppose there'd been a fundamental change of circumstances and no one had anticipated within a

year. Now improbable but so long as you comply with the objective analysis of the section, that's the end of it. Now but worst still, at (iii) "the court should not exercise its discretion to permit contractual obligations undertaken… from being swept aside, unless it is shown very strong grounds for doing so." Well that may have applied in 1952 but it certainly doesn't apply post-2008 and even more so post-2017.

Now it is through that prism that the rest of the judgment has to be seen, and we go then to the first ground, change of use, which you get in an analysis starting at 78, but it kicks into play really at about paragraph 94 where – this is just a change of use, all you have to say, and you'll recall Your Honours my point that while that land could have been used up until 2012 for grazing et cetera, post-2012 that was no longer complying. So, in fact, Synlait is not able to use that land for any legitimate purpose, not even for grazing, even if there was that absurd proposition that it might want to use eight hectares for grazing in an 80 hectare industrial development. But when you look at 94 they say, "We repeat that the covenants were entered into for a period of 200 years… Some changes must have been in contemplation when the covenants were created." Now that proposition is repeated again later in the judgment. Well of course in 200 years some changes are contemplated. That's hardly the point. The point is that in the following 14, well following 18 years, there were significant changes to the neighbourhood and the zoning which the parties could never have contemplated. By the way, Your Honours, at paragraph 44 of Justice Woolford's judgment he finds as a fact that the parties could not have anticipated this back in 2000. So that's the first issue where we say they never actually got to grips with any significant change. Overlooked the fact there had been this significant, this impossibility now, to actually do what the covenant contemplated they were entitled to do.

Now under the change of character, which they dealt with from 95 through to 98, again the key paragraph is 99, and there are a series of propositions there that we disagree with. They say that the burden imposed on the covenants on the servient land is no different to which we say, of course, it now prevents them from actually using the land at all, and certainly stops them from using it

in a way, in the best possible way and the way that the council wants them to use it, namely industrial. On the fourth line, covenants were entered into relatively recently. They have a long-term. Change must have been contemplated. Once again that proposition.

WINKELMANN CJ:
What paragraph are you at sorry Mr Miles?

MR MILES QC:
Paragraph 99 Your Honour. That's the, that I think is the key paragraph when dealing with the second ground, change of neighbourhood.

WINKELMANN CJ:
One might think that the Court is weighing there, well you could see several things as that as being relevant to. One, it's an evidential point, if you've just negotiated and concluded it, it means you're likely to have, foreseen what the changes are and you would say – the other thing is that there will be some bargain at work and therefore you're not getting much of what you covenanted for, I suppose that could be the other side that's relevant.

MR MILES QC:
To which we would say a couple of things Your Honour. We're talking about 20 years here. Secondly, we're not talking about the original covenantor or covenantee, that all changed. So we've now got a new player on the block coming in in 2018. Secondly, the benefits and the burdens have fundamentally changed. The burden has changed in the way I've already described, but the benefits have changed fundamentally because NZIP is now faced not with a potential objection by Synlait, but an objection by two other similar factories in the same area, Yashili and Winstone Nutritional, so where's the benefit. If they're going to be facing precisely the same objections as they would for Synlait, the whole benefit is gone, effectively gone. Of course it's gone entirely because part of the new evidence that we're wishing to rely on is an undertaking that Synlait gave a couple of months ago where it said that not only would it not object to any application to quarry or

excavate, but it would actively support, as far as it reasonably could, and the reason for that s in the affidavit that we wish to have part of the evidence, is that the milk plants now, and certainly the Synlait plant, is so designed that it filters out dust. Dust doesn't get near it. So it can handle any potential dust or problems that might arise. On the off chance, by the way, the off chance that NZIP will ever do anything about this discretionary right to excavate. It still hasn't applied and there's a good deal of scepticism about whether it ever will, but that's by the by. So that's our reply to that proposition.

O'REGAN J:

Was there thought to just asking the Court to vary the covenant instead of – I mean if you're right that Synlait's plant is unaffected by a quarry, and if that really was the benefit of the restrictive covenant, why didn't they just ask for it to be changed to say we can build a dairy factory but we can't object to a quarry?

MR MILES QC:

It should have been Your Honour. In the same way they should have relied on grounds (e) and (f). In the same way they should have provided evidence, that it had no impact. Regrettably, it wasn't there.

O'REGAN J:

It's a bit of an issue coming to a second appeal court and saying, effectively we start afresh, isn't it, that's the problem.

MR MILES QC:

Well, it's largely, if the evidence was significantly different I could understand that Your Honour. In fact it's really just an extension of the evidence that was already there because it was argued there it would have no impact. It was just that the, I think the primary basis was there were a couple of other factories there so you were going to be faced with the same proposition come what may.

Just staying with 99, their Honours went on to say, “It is only the zoning, and therefore the aspirations of STL as owner, that have changed.” Well that’s, with respect, a very misleading proposition.

WINKELMANN CJ:
I wondered about that. Was it Stonehill that secured the zoning change?

MR MILES QC:
No it wasn’t Ma’am. It was Winstone’s back in 2012 supported the zoning change. They owned all the land at that stage. So they, the council went ahead with the proposed change. Winstone’s supported it. Stonehill only came to the picture later as did Synlait. So they then go on to say, “… but the fact that the neighbourhood has changed in character, does not mean that the covenants ought to be modified.” They then go on to say, “The construction of the Synlait dairy factory… has greater significance for NZIPL… The factory will be closer to any quarrying…” and any impact will be more than any of the others. Yashili, Winstone are further away. They’re not. When you look at the photo you’ll see that they’re the same distance away. There’s no material difference there at all. So it’s just wrong at every level on that ground.

Now they then, on the third ground, that’s (a)(iii), that’s the catch-all provision, we’ve set out the issues there. I don’t want to spend any time on that because I want to get into the fourth ground, which you’ll find starting at paragraph 107. Your Honours it’s just been pointed out that the original application did have the alternative of modify.

O’REGAN J:
What happened to that?

MR MILES QC:
It got rejected in the overall judgment.

O’REGAN J:
Well I suppose Justice Woolford went further so he didn’t need to deal with it.

MR MILES QC:

Yes.

O'REGAN J:

Right. So that is part of the pleadings, is it?

MR MILES QC:

Yes, it's part of the pleadings and was part of the, I was wrong on that, that was part of the application. Now at paragraphs 107, and in particular 108 through to 110, they deal with the third ground where if there's been a change, the wording precisely is with the continuation of the easement, in its existing form would it impede the reasonable use of the burdened land in a different way, in a way that wasn't foreseeable. So the emphasis there Your Honours is, is there now as a result of really change of circumstances, an alternative reasonable use of the land, which is now being restricted by the covenant, and at a fundamental and a crucial level we say that is exactly what is being impeded here. That the land which is clearly industrial now can't be used for that because the covenant locks them in to this rural concept and does so for the next 200 years, and the way that their Honours deal with that at 108 and 110 is we say deeply flawed. If you go to 108, about five or six lines down, you'll see they say, "It is the manner or extent of the impeding of the use," you could add in that "of the land" because that's what the clause says, "Must have changed in ways not… foreseeable." Therefore, if the manner or extent of the impeding of the user remains the same the application will not be made out. Now that's a slightly opaque sentence but what Their Honours is saying is that if the manner of impeding of the use – sorry, it's the manner of the impeding use which has to change. That just means the covenant because what impedes the use? It's the covenant. And when you say, and they expand on that at 110 where you'll see, "We agree that the impediment to the reasonable use of the servient land has not changed… The restrictions were contemplated from the outset, and they are now no different from those which were foreseen." That's simply saying, Your Honours, that it's the covenant which hasn't changed. Well of course the covenant hasn't changed. The covenant remains what it is. That's not what the section is

dealing with. The section is dealing with a reasonable use of land which wasn't contemplated at the time the covenant was entered into. They never deal with that. They rephrase the test to actually deal with a different proposition altogether. If that's not bad enough, they go on the next sentence, this is half way down 110, "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." And they quote an elderly case. Now that is exactly contrary to what the section says. The section says you may extinguish if there is now reasonable use of land which wasn't contemplated. So the proposition is directly against what the section says.

WINKELMANN CJ:
Is that in paragraph 110?

MR MILES QC:
Yes, six lines down Your Honour. See, "The covenants are notified."

WINKELMANN CJ:
Yes.

MR MILES QC:
"… and arguably any use which is inimical to the covenants cannot be considered a reasonable use of the land." Well of course using the land industrially is inimical to the covenant which wants to lock it into this little rural lifestyle block, but Parliament from 1986 has said, if the land has changed in a reasonable way that you can extinguish the covenant.

Then they go on to say, "We repeat that the term of the covenants is such that restriction on future use must have been foreseeable." Well of course restriction on future use is foreseeable, that's what the covenant is there for. The issue is what was foreseeable and what wasn't foreseeable was the way the entire character of the land is going to change.

Then my last comment just on the judgment itself, and I could spend a great deal more time on it, and I can today Your Honours, but at 115 and 118 they deal with the sort of damages that was likely to occur. At 115, "There was unchallenged evidence before the Judge that any dairy factory will be sensitive to contaminants…" Well, that was just broad evidence from the planners actually I think largely that you'd expect dust and whatever so inevitably there will be damage. But at 118, "We agree with Mr Broadmore that if the covenants are modified or extinguished… NZIPL could well suffer injury of an intangible kind." In other words, not the sort of injury that often is part of these applications, you know, permanent obstruction of views et cetera. This is intangible in the sense that if should they ever decide to apply for a consent to quarry, then there might be objections and those objections could be within the absence of the covenant those objections, Synlait would be entitled to object, and the likelihood of getting permission to quarry would be reduced. In other words it's a sort of a loss of a chance of sorts. Now that's the classic circumstances where a Court ought to have said, we now look at the issue of whether this can be dealt with financially, and in comes then 317, is it (4), which was the 2008 provision that said that in appropriate circumstances some financial compensation would be appropriate, and given how vague all of this in the future, that would be the obvious area to have looked at. So when we come then to why –

WINKELMANN CJ:

Can I just ask you before you move on. One thing that did occur to me was that a significant change is this rebundling of the land so that the covenant is affecting land which is not subject to covenant. So it's actually being sliced and diced which tends to change the whole way it operates in any case.

MR MILES QC:

Of course, and that was regarded as significant by Justice Woolford. It was rejected in the Court of Appeal and it would be one of the further grounds, it's one of our grounds of appeal Your Honour, because it goes to the character, it goes to the use, it goes to pretty much each of the grounds, and I mean I haven't spent any time on that but that is part of our appeal.

WINKELMANN CJ:

And the expectations I suppose.

MR MILES QC:

Of course. Of course. Now if we come then to, I'm conscious that I have only another 10 minutes perhaps, well maybe 10 minutes, I come to the issue of grounds. The hard bit I think is this Your Honours. This is a decision in 2018. It's the latest decision by the Court of Appeal. It is not just a decision on the fact, it's an elaborate considered judgment dealing with how the Courts should approach applications under 317. With the greatest of respect to it, we say it's riddled with errors and that it is time and appropriate for this court to have a look at 317 and to determine how each of these grounds, as they have been amended and added to, how Courts should approach them, and as part of that I will be suggesting Your Honours have got to look at (e) and (f), those amendments, because they're part of the law, and also of course to give guidance on circumstances when the detriment to the beneficial owner would be properly determined by monetary compensation rather than continuing to lock the parties into a covenant which has long since passed its use by date.

So let me add a second ground, Your Honours, as to why this should be dealt with by the Supreme Court. The first is there's a whole set of principles set out in this judgment which are wrong, we say. Secondly, there are three judgments post-2008 which are important and which have either just been touched on in this judgment and ignored, or simply – or all three have been mentioned but not followed, and in the three judgments which are set out in our authorities there is a judgment *Harnden v Collins* [2010] 2 NZLR 273 (HC), that's at tab 2, that's a judgement 2010 of Justice Randerson and really the importance of that is really paragraphs, just note paragraphs 24 and 25, statutory history, progressive broadening of the scope, relaxation of the Courts in exercise of discretion. Fourth case, *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670, a judgment in 2014 of Justice Katz, and Her Honour in that judgment, and it's a significant judgment because it deals with the circumstance change of zoning and she holds quite specifically, as you would expect, that a change of zoning is a

fundamental issue in whether the covenant should continue in its present form. Fifthly, and one might say most importantly, *Okey & Anor v Kingsbeer* [2017] NZCA 625, (2017) 19 NZCPR 25, a judgment of the Court of Appeal in 2017, a judgment incidentally delivered by Justice Woolford, the trial Judge in this case, Justice Kós was part of the Court, and *Okey v Kingsbeer* again confirmed the fact that Courts are now looking at this through a different prism. So we have *Okey v Kingsbeer* and this judgment just a year apart, both sending quite different signals and I would go so far as to say that the approach of the two are fundamentally different, a further reason why this Court has got to get involved.

Now Your Honours, I'm down really to a couple of minutes, perhaps if you could give me another seven minutes just to – well, I have got seven minutes.

WINKELMANN CJ:
Yes, use your seven minutes.

O'REGAN J:
The more you talk about the time the more you're using it up.

MR MILES QC:
Well I like to do what I'm told. The further, the grounds now we've set those out, as you'd expect, at page 8 of the submissions. The substantial miscarriage of justice. Now let me just deal with (b) and (c) first, because they're the usual grounds. A matter of general or public importance. Well I've set out why it's a matter of general importance to the profession that this Court deal with 317. General commercial significance one of the points we make at page 9 of the submissions at footnote 72 that there was a search of the number of applications under 317. In the period 2008 to 2013 there were 13 applications. The next five years, Your Honour, 2014 to 2018, there were 28 applications. So it's doubled in the last few years. So there's no doubt that there is some real commercial significance in this section, and of course if, and I think I'm entitled to move a little more locally as well, because in the affidavit, the Chief Executive's affidavit, he makes the, which is what you'd

expect from the evidence that's before the Court. This is a $280 million factory which directly impacts on at least 55 current farmers who have contracts with Synlait and a large number of other jobs and related activities and whatever are part of the new regime if you like. It does have real significance simply outside the commercial importance to Synlait. So those two grounds seem –

O'REGAN J:
What's happened to the dairy factory in the meantime? Is it operating?

MR MILES QC:
Yes. It had, Synlait was criticised because it beat the gun, and what we'd say to that Your Honours is that it took advice. It was under pressure from the local areas because a lot of the local farmers wanted an alternative to other milk producers. It set out a series of, it entered into a series of milk supply contracts. It had to be ready by the time, by the season, this year's season, and the advice that it got, as you would expect, was the proportion advanced before Justice Woolford and the proposition I'm advancing today is that on any objective analysis those requirements under 317 are being complied with. So it was not reckless, it was structured, it was careful, but of course it's open to the proposition that it did what it did, to which I would add, well it was vindicated in the High Court. But that is what it is.

WINKELMANN CJ:
It didn't start construction beyond some basic groundwork –

MR MILES QC:
Well it was basically, I did ask about that Your Honours. It was basically groundworks but they had, by the time the case was argued in October last year they had begun some construction to the factory.

Now the first ground, substantial miscarriage of justice, and this brings in the, at least in my experience Your Honours, the unique situation where Synlait

has been substituted as a party. So Synlait was not a party in the High Court and Court of Appeal. It –

WINKELMANN CJ:
Would you consider it bound?

MR MILES QC:
It's bound by the judgments. I don't believe it's bound by what we would say was a failure by Stonehill's advisors to do what they should have done, which was to have become aware of these crucial amendments and I'm instructed that counsel and solicitors for Stonehill were simply unaware of those amendments. By the way they were amendments under the Land Transfer Act and what those amendments in the Land Transfer Act said is, these are amendments to the Property Law Act. So I suppose if you were having a quick look at the Property Law Act in 2017.

WINKELMANN CJ:
You could have missed it.

MR MILES QC:
Yes, they missed it. But by the time – but the hearing was in October, I think the second half of October 2018. The amendments which were passed in 2017 came into, were triggered on the 12th of November 2018, just a fortnight after a case was argued and –

WINKELMANN CJ:
They came into effect.

MR MILES QC:
Yes, and ironically a day before the judgment of Justice Woolford, which was on the 13th. Now I'm going to hand up, if Your Honours would find it useful, a few pages from an extract from Burrows on what happens, what the Courts tend to do when faced with applications that take place and judgments that take place after the law has been amended, but prior to the law actually

kicking in. You'll see it at, it really kicks off at page 597 and through to 599. Again, Your Honours will have a look at this when considering my submissions, but I think it's fair to say that the Courts when faced with these circumstances say, well, Parliament has spoken. There's no question of what the law is. This isn't a Bill, the statute has been passed, the only issue is that it comes into play next week rather than today. In those circumstances I say, Your Honour, that Stonehill should have used those two further grounds, should have argued them before Justice Woolford, and His Honour would have been entitled to have said, well, there's no question this is going to be the law in a couple of weeks' time. I'm certainly going to take it into account. Or if you wanted to be totally pedantic, I will not, I will order that these – if those two grounds had been established my judgment is that they will come into play on the 13th of November. But one way or another they should have been taken into account, and the reason why they're significant is that (e) which talks about public policy, public policy is squarely brought into play when you're looking at the proper use of zoned land. If the local council says that the best appropriate use of the land is industrial, then you could well argue, and you're entitled to argue, that it's against public policy to lock into a restrictive covenant that specifically prevents 10% of that industrial land being used for that purpose for the next 200 years. So (e), in fact, would have had a significant impact but (f), even more so, because the discretionary right, which is so significant in this area, has been expanded now to pretty much the ultimate you can get in forms of discretion, just and equitable. So they are significant and they go to the first ground about whether a substantial miscarriage of justice has taken place.

So Your Honour, yes, we're bound by the judgments. We would have been bound by any undertakings that would have been given to the Court, but we are entitled, as indeed Stonehill would have been entitled, to have come to this Court and say, perhaps with new counsel, we've been badly advised and as such we're entitled to run a substantial miscarriage.

WINKELMANN CJ:

You could say in any case, even if you're not entitled, even if it hasn't been raised and it's unfair to the other side to raise them, you could say nevertheless that (e) and (f) are relevant to the approach under the provision generally.

MR MILES QC:

Yes. Keep in mind too, Your Honours, that (e) and (f) would have applied pretty much on the basis of the evidence before the Court at the time. They're really legal arguments based on that evidence. We're seeking to expand that evidence a little in our application. But the evidence that we're seeking to rely on is not evidence that is, how shall I put it, it's evidence that one would have anticipated, particularly if you're on the other side, you'd have anticipated this evidence to have been given, and it is simply confirmatory of the proposition that contrary to what the town planners on the other side suggested, that in theory dust and whatever might have an impact, and even I can understand that, you know, in an intuitive sort of way. You'd say the last thing a milk plant wants is dust and rubbish and whatever around, so I understand. But it wasn't based on any science. It was simply based on one's intuitive sense of what might or mightn't work, and you'd have expected as an obvious retort to that, well actually, while in an ideal world obviously it would be nice not to have it, our factories are designed to ensure that that gets filtered out. So it's not going to have an impact and by the way we'll give you an undertaking that we won't object. That's all that's being sought.

Thirdly, the town planning evidence, which is simply not controversial, it's just a matter of law. What is the impact of a change of zoning to industrial and what activities does that permit, and it's just confirmatory that it does not permit grazing of sheep and the use of land as a lifestyle block. That is non-complying. Now there's nothing controversial about that, that simply is what it is, but it is significant because it obviously has a major impact on the use of land and the long-term use. So…

WINKELMANN CJ:

Time's up.

MR MILES QC:

I think I have covered all of those grounds that I undertook to cover Your Honours, and I'm sorry it's been a bit once over lightly, but there it is.

WINKELMANN CJ:

Thank you Mr Miles.

MR GALBRAITH QC:

Thank you Your Honours. I'll come to the detail a little bit later, but can I just say one thing to start. Would Your Honours please be cautious about some of the revisionist evidence given by my learned friend from the Bar. I just take one example. My learned friend suggested it was only the planners who spoke of the dust problem. In fact the respondents called evidence from the former manager of Yashili, and his affidavit will be there, in which he's described the dust problem and the steps which are taken, and were taken by Yashili because of that problem and so as I say if you just be a wee bit cautious about some of what you were told.

I'll come back to the detail as I say, but if I can start by explaining what, in my submission, is, with the greatest respect, the way that this matter should now be dealt with. As my learned friend said we have the position where Synlait has been substituted. Synlait was, of course, the contracting party with Stonehill and as part of that contract that Stonehill, it was conditional upon Stonehill getting rid of or having the covenants modified. So Synlait was, on my instructions, involved, certainly present during the various hearings. Synlait now wants to call further evidence –

WINKELMANN CJ:

Is it said Synlait not Synlait?

MR GALBRAITH QC:
Sorry Synlait.

WINKELMANN CJ:
I wasn't correcting you Mr Galbraith, I was correcting myself.

MR GALBRAITH QC:
My learned friend's clients now want to call further evidence both from the manager of the company and also from a planner. They obviously want to call that evidence because they see it as of advantage to them otherwise they wouldn't be applying to call it, and they clearly if one looks at the written submission they want to run a different case on appeal than was run in either the High Court or the Court of Appeal, not only because of their reliance on subparagraph (e) and subparagraph (f) but because of their general approach, it seems to me at least, to the issues and some of my learned friend's submissions made that very evident.

They also, of course, now rely upon an undertaking that was belatedly given after the Court of Appeal didn't see eye to eye with their position, and I'll have to say something about that undertaking, but the effect of that undertaking is a matter that will be an issue. We've dealt with it in our written submission but it's not simply that they give an undertaking, that that is binding, that that, and doesn't allow them some area for manoeuvre. It doesn't mean that the council on an application by the respondents for quarrying permission won't take into account the environmental effects of the quarry on the area in general, whether it be particle volumes or whether it be traffic volumes or whether it be something else. It's got nothing specific to do with Synlait themselves. So it's not a panacea for the position that the covenant secured for the owners of the respondents' land.

O'REGAN J:
Are you saying that if it's grazing land a quarry is not a planning problem, and if it's a dairy factory it is?

MR GALBRAITH QC:

Potentially it is Sir, though that's going to turn on evidence. There was evidence –

O'REGAN J:

But what about the other dairy factories close by? I mean dust doesn't stay in one place.

MR GALBRAITH QC:

No it doesn't stay in one place and the Yashili evidence Sir did speak of that, but it's not, with great respect again, as simple as the revisionist approach my learned friend suggested, well we just design it so dust isn't a problem. In fact, and I think Mr Clement's affidavit that they want to file does speak of they would need to clean the filters more often, for example, okay problem, so how does the council ensure they do clean the filters more often. That's not a –

WINKELMANN CJ:

Well they don't have to. That's not the council's responsibility is it?

MR GALBRAITH QC:

No, it's not the council's responsibility, but the issue of what happens if they don't and then people fall ill because of dust pollution.

WINKELMANN CJ:

Well that's really getting really hypothetical. But your point is –

MR GALBRAITH QC:

It's all hypothetical at the moment Your Honour.

WINKELMANN CJ:

No, but it's extremely – yes, well there are degrees of it, aren't there.

MR GALBRAITH QC:

Having gone through the Fonterra Danone exercise Your Honour, yes. I mean that would've been regarded as botulism in dairy milk products in New Zealand would have been regarded as hypothetical too.

WINKELMANN CJ:

I mean aren't you arguing against yourself to some extent here because you have Yashili sitting there and the Winstone plant as well. These arguments could be made in relation to them.

MR GALBRAITH QC:

I'm not arguing for or against them, Your Honour, I'm simply pointing out that there is, and the evidence from the planners was that those are issues that the council would have to take into account, so to –

WINKELMANN CJ:

Can I just ask you to contextualise that. I thought you were saying the undertaking is not a panacea because of these other considerations.

MR GALBRAITH QC:

That's right.

WINKELMANN CJ:

So you are arguing the undertaking really doesn't – that was my point, it doesn't help.

O'REGAN J:

But anyway that's for an appeal if we give leave.

MR GALBRAITH QC:

That's right.

O'REGAN J:

We're not going to decide that now.

MR GALBRAITH QC:

What I'm saying is that –

O'REGAN J:

That's why I asked Mr Miles why they didn't just have a different covenant that says, that doesn't stop your client from doing what they want to do, and doesn't stop Synlait doing what they want to do.

MR GALBRAITH QC:

That may be something which Synlait decide they want to argue on an appeal. The point I'm trying to make, obviously not very clearly, is that there are these issues which have not been ventilated in either of the two Courts below. We're going to have a new case, it appears, on appeal if leave is granted. There is going to be, if Synlait's application to call new evidence is allowed, there's going to be an issue about the respondents' entitlement to produce its own evidence contesting that evidence. There will be an issue about the respondent producing evidence to contest the effect of the undertaking. There'll be the issues that –

GLAZEBROOK J:

I'm not quite sure what the undertaking has got – to be honest the undertaking doesn't seem to make much difference either way, because I'm not actually sure why, if the undertaking isn't going to make a difference, why the covenant makes any difference to what the planning authority decides to do or not to do.

MR GALBRAITH QC:

The covenant makes a difference, Your Honour, because the whole purpose of the covenant was to restrict the use of the servient land so that it, there wouldn't be a sensitivity issue arising out of that use, and the use of the development of the quarry. It's –

GLAZEBROOK J:

Well it's just because, I suppose it comes down to the fact that the whole area has changed and you've now got two other factories there, that have exactly the same problem as the Synlait factory, which is why I say I'm not sure it makes terribly much difference either way.

MR GALBRAITH QC:

Well that –

GLAZEBROOK J:

So the only thing you've got rid of is one factory rather than all of the others that are surrounding it.

MR GALBRAITH QC:

The respondent didn't get rid of – the undertaking is nothing to do with the respondent. This is something which the appellant produced of its own decision as a means, presumably, of persuading our court –

WINKELMANN CJ:

We understand that Mr Galbraith.

MR GALBRAITH QC:

I'm not arguing for the undertaking, I'm just trying to –

GLAZEBROOK J:

No, no. All I'm saying is – well, I'm not sure the undertaking makes any difference because the issue is, isn't it, has this changed so much. So the only thing that the covenant does is actually restrict one piece of land but not all the other pieces of land that are going to be taken into account when the council is deciding on the quarrying application.

MR GALBRAITH QC:

And what will be a matter of evidence, and was a matter of evidence before the High Court and the Court of Appeal.

WINKELMANN CJ:

That includes Synlait's land where it could actually build the dairy factory – it could decide, okay, it would be very strange for it to do so, but it could decide, okay, we are going to dismantle this factory and move it closer to the land and build it.

MR GALBRAITH QC:

As our written submissions indicate, there is a physical issue about whether that could, in fact, practically be done because of the geography of the land. So that's another issue which, again, is, if it's going to be contended by Synlait as to that, there are facts to be ascertained.

WINKELMANN CJ:

Well they did contend that, didn't they? Wasn't that at issue I think? They made the point that they had land which is closer to the…

MR GALBRAITH QC:

They made the point it was closer. What they haven't dealt with is the point that it's very steep land and it may not therefore be suitable for the development of a dairy factory, and this is the problem about all of these issues which are now being raised by Synlait, or Synlait want to rely upon, which the respondents so far haven't had the opportunity because it wasn't confronted with those issues, to deal with, and the short point I was getting to was that, and as my learned friend said about the compensation point, it's a different point now that Synlait's there. Mr Clement's affidavit that he wants to have filed on behalf of the company says that the reason they continued to proceed despite the existence of the covenant, despite knowing that there was an appeal on foot, was that they were anxious to be able to commence operations in time for this season. In other words they front-ran the whole issue, instead of doing what one should do under rule of law, which is actually subsection (e), they didn't come to the Court first, find out whether they could modify or remove the covenant. They, for their own financial benefit, and when I say "they" I'm talking about the company, the company for its own financial benefit tried to front-run the whole exercise because it could then get

12 months additional season. So when you come to compensation, in my respectful submission, one of the issues on compensation is how do they benefit by front-running the exercise.

O'REGAN J:
Well except that doesn't really arise if this Court finds that the High Court wasn't actually right.

MR GALBRAITH QC:
That's right. It only arises if the appeal succeeded Sir. But there are all of these issues which haven't been fully dealt with, certainly the respondent hasn't had the opportunity of fully dealing with, and my respectful submission is this is actually a case where, because in principle this is an argument about facts not an argument about the law despite my learned friend's vigorous attempt to persuade you to the opposite. This is really an argument about how the facts apply to the statutory provisions. This is a case where leave should be refused, the Court should stick with its principles on that. That doesn't stop Synlait making an application now producing whatever evidence it wants to produce, having a proper pleading of the grounds on which it's relying, and the respondent can seek discovery if it needs to in relation to some of these matters, that a respondent then has the proper opportunity to call its own evidence in contradiction to that which Synlait is providing –

WINKELMANN CJ:
I was going to ask about that because the conditions, I don't think the order joining Synlait has been made, but it's consented to and the conditions include that Synlait is bound, don't they, aren't they?

O'REGAN J:
Isn't there a res judicata problem though?

MR GALBRAITH QC:

I don't think there is Sir. Well, there is in the sense that unless they bring another application and get a Court order, yes –

O'REGAN J:

Can they bring another application if they are standing in the shoes that Stonehill were previously standing in.

MR GALBRAITH QC:

I think they, my own view Sir is that anybody, including Stonehill, could bring another application provided, it'll only succeed if there's new facts before the Court obviously, but it doesn't seem to me that section 317 is one of those you're dead if you lose the first time. You can come back –

WINKELMANN CJ:

Well but there's the abuse of process issue.

MR GALBRAITH QC:

Yes there is.

WINKELMANN CJ:

And I'm sure you'd take that point, I imagine.

MR GALBRAITH QC:

I wasn't thinking of taking that point but…

GLAZEBROOK J:

The other point is it seemed to me that, well as I say I don't see the undertaking as being particularly significant, I don't see the new evidence as being particularly significant, apart from the non-complying use aspect of it, and is that contested?

MR GALBRAITH QC:

When you say "the non-complying use" do you mean that that land now is zoned for industrial and therefore it can't be used for grazing?

WINKELMANN CJ:

But dairying is a non-complying use.

MR GALBRAITH QC:

I don't – well, whatever the uses are under the industrial zone of the complying uses at the moment. There's plenty of land which is zoned for industrial, or for any other use, which is not actually used for the zoned use at any given time. That's just a fact of life. The fact that zoning changes doesn't suddenly change the use –

GLAZEBROOK J:

Well that's what I would have thought, I was going to ask Mr Miles about that.

MR GALBRAITH QC:

Well it's just fundamental in resource management terms.

O'REGAN J:

But to say that a change of zoning use doesn't have any effect on a restrictive covenant, on a section 317, does seem to me to be pretty counterintuitive.

MR GALBRAITH QC:

Well no, with great respect Your Honour, it depends on the terms of the covenant of course because otherwise the way to get out of a covenant is simply get your land rezoned and the restrictive covenant is not a –

O'REGAN J:

But covenants are subject to section 317. That's just like night following day. Covenants for 200 years only last 200 years if the Court doesn't order that they be extinguished.

MR GALBRAITH QC:

Yes, that's absolutely correct, but it's the way that one, and the Courts have interpreted to date, the application of zoning changes.

O'REGAN J:

Yes but potentially wrongly. I mean isn't that something we need to be concerned about?

MR GALBRAITH QC:

Can I just try and explain. If you look at the *North Holdings* case where Justice Katz said, yes, the change in zoning does count, but the covenant there was in terms of the zoning, that was what the covenant was. If you were to develop the land but you were to develop the land for an industrial – in compliance with the industrial zoning at the time what happened the zoning subsequently changed and therefore the land couldn't be use for the covenanted purpose, and Her Honour then said, well there should be a variation. When you have a covenant such as this, which is a reverse sensitivity covenant, it's with great respect different because the purpose of the covenant is to stop the land being developed in a way which will create a sensitivity problem, and the fact that a council goes and changes the zoning of the land doesn't affect the use of the covenant or the purpose of the covenant which is, as I say, to stop the land being used. So that's what the parties contemplated at the time. The land could not be used for a purpose that created a sensitivity problem for the, as it was, the potential for a quarry. It's a lengthy period of time in the covenant, knowing about that, but having had some experience of quarry cases, that's because quarries last for an awful long time. They're not in and out short-run at all. They do last for decades –

O'REGAN J:

But isn't that a controversial point? I mean you just put a proposition to us that in those situations zoning shouldn't affect it. That seems to me to be not axiomatically correct at all.

MR GALBRAITH QC:

Well I know if it has been controversial in the cases to date Sir. It's generally been regarded that one looks at the purpose of the covenant and you see where the, whatever the changes which is being put forward is a change

which is inconsistent with the purpose of the covenant which, in my respectful submission, this one is, and if you –

WINKELMANN CJ:
So you say that this zoning change means that they can dairy on there without any application?

MR GALBRAITH QC:
No, I didn’t say that Your Honour.

WINKELMANN CJ:
No, well can you tell me what you do say?

MR GALBRAITH QC:
I didn’t say that in the application.

WINKELMANN CJ:
No, so I'm saying can you tell me what you do say?

MR GALBRAITH QC:
Yes. It depends. I don’t know what the history of the land is. It might have an existing use right, I don’t know, but if it hasn’t got an existing use right, yes, then they would have to apply for grazing, for example, which is one of the uses permitted under the covenant. I would be extraordinarily surprised if they couldn’t get a planning consent to graze, being one of the most innocuous uses one can think of, and definitely not creating any sensitivity issue in the area. Now I've had some experience in resource management, I'm not going to give evidence from the Bar, but that’s the sort of evidence that one might expect to receive. Their planner, the new evidence they want to produce, is suggesting that there would be great difficultly, or perhaps “great” is putting too much, some difficulty because an application would have to be made. As I say, I would be amazed if you couldn't get permission to graze.

O'REGAN J:

You said you weren't going to give evidence.

MR GALBRAITH QC:

I know and I've just done it. I saw Your Honour was going to say that to me half way through and Your Honour is quite right. But just looking at it in common sense terms it would be surprising. Anyway, that's the evidence that we want to be contested.

GLAZEBROOK J:

I suppose what I was asking, there seemed to me to be issues of principle even if you take aside all of the new evidence and you also have the (e) and (f) issue so I'd quite like you, I understand your point about the new evidence.

MR GALBRAITH QC:

Yes. Can I talk about (e) and (f) because I think that's what Your Honour is asking me about.

WINKELMANN CJ:

Well, no, before you do can you talk about the broader issues of principle that Mr Miles raised which are the test. He says the test is –

GLAZEBROOK J:

That's what I was asking you to do. To forget the new evidence, I understand the new evidence, but just to look at why, leaving aside the new evidence, the application isn't one of principle.

WINKELMANN CJ:

Because a judgment, Mr Miles took us through the parts of the judgment which he says, and they read as if they do, set quite a narrow test under the section generally, and he says that that is, of course, of importance because there are a lot of covenants put on properties, and now a lot of applications, and it's important the Court gets the test right.

MR GALBRAITH QC:

Well in my respectful submission there isn't anything surprising or unusual about the, I don't know if one would call it the test, but the approach which the Court of Appeal has expressed, and one needs to read all of those paragraphs, sorry, I mean need to read the judgment in full, but if for example you just take a paragraph which my learned friend relied upon as being significant, which was paragraph I think 74 where they referred to *Luxon v Hockey* and the *AFFCO* cases, which were earlier cases, but my learned friend didn't point you to the last subparagraph across the page, "We agree with the general approach discussed in both cases, although we note that both were decided before the jurisdiction to award reasonable compensation where a covenant is modified or extinguished was introduced." And they're also referred to the cases since 2008 where compensation is available and that has moderated the potentially adverse impacts of 317, and they've recognised that, and my learned friend also suggested to you that cases such as, we're talking about the test now, cases such as *Okey*, the Court of Appeal case, and that shows that there has been some considerable movement. If one actually looks at *Okey*, or for that matter Justice Randerson's decision, you'll find that it's expressed in a virtually similar terms to that which the Court of Appeal in this case has expressed. So in *Okey* which as my learned friend quite rightly said when the judgment of the Court of Appeal was given by Mr Justice Woolford, who was the Judge in the High Court here, if you look at 52, "The courts have traditionally taken a conservative approach… This is for good reason: applications to modify or extinguish an easement generally impact adversely on existing property interests." And one of the cases, quite rightly, points out that this has been an approach taken since Magna Carta, that property interests are something which the Courts take into account, but you'll recall in the written submissions of the appellant, in fact there's the suggestion that there shouldn't be this, I think they suggest wrong emphasis, on property interests. Well that's what the Court of Appeal said in 2017 and *Okey* also and I would have thought that was unexceptional.

But it goes on in the same paragraph, "But s 317 still cannot be used to free a servient tenement owner from an easement simply to improve the enjoyment

of his or her property or for his or her private purposes. The courts should be hesitant to allow contractual property rights to be swept aside in the absence of strong reasons." Now it's really part of an answer to a point that Justice O'Regan was making to me.

Paragraph 53, "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." Which is the same point. Although there will – well. Paragraph 55, "Nor do we consider the easement impedes the respondents' reasonable use of their land in a different way, or to a different extent, than that which could have been reasonably foreseen at the time of the grant." Well at the time of the grant it was quite express what it could be used for so there's no question about foreseeability.

O'REGAN J:
Yes, but I see all of these things as being potentially controversial. These are all decisions of the Court of Appeal or the High Court. They don't bind us.

MR GALBRAITH QC:
Yes.

O'REGAN J:
So the question is, is there a point of law, or not. I don't think it's an answer to that to say, well there isn't because all the lower court cases are clear, because they might be wrong.

MR GALBRAITH QC:
Well, I mean any law might be wrong, Your Honour, I can't dispute that. I mean that's obviously correct but the question is do Your Honours think it's so arguably wrong that that gets around the restrictions on leave to the third level. But it still doesn't get around the issue that Synlait now want to run a different case from that which was run in the High Court and the Court of Appeal, and I do think I need to say something –

GLAZEBROOK J:

On what basis is it's different? It's different because of (e) and (f), and it's different because of the new evidence.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

Apart from that, what's different?

MR GALBRAITH QC:

Well that's quite a lot Your Honour but let's just talk about (e) and (f).

GLAZEBROOK J:

No, no, I understand, we may say well we don't want to have anything to do with the new evidence.

MR GALBRAITH QC:

No, no. Can I just talk about (e) and (f) for a moment, because it's –

WINKELMANN CJ:

Well are you leaving this part because I just had one question?

MR GALBRAITH QC:

No, no, that's fine.

WINKELMANN CJ:

It seems to me that the problem I have, so I just wanted to give you an opportunity to address it, is to suggest that there is a single test of showing very strong grounds for changing which ways this property, creation, the value (inaudible 11:16:23) contract and the recognition of estates created in land very heavily creates one test, does not seem to me to reflect the flexibility that the section contemplates, because of course it depends upon the nature of the benefit and the nature of the burden, and that's my thought.

MR GALBRAITH QC:

I agree with Your Honour totally. That's the factual issue. That it all depends on the facts. So if you're asked a question about any situation it won't be that the law is X, the answer will be it depends on the facts. That's what the answer will be, and so all the facts have to be taken into account. They have to be weighed in terms of the statutory test, and then a decision made, but I think with respect that it would be surprising if there wasn't some, how can I put it, some onus or at least some weight placed on the fact that there is a contractual restriction and you don't just wash that away because it suits somebody. So the odds are that while the words used may be different the effect is going to be the same. So it does all depend on the facts and I'm not for a moment…

O'REGAN J:

I mean the introduction of the possibility of compensation does seem to indicate a statutory intention that it will be more frequent that these covenants are allowed to go because you can compensate.

MR GALBRAITH QC:

Absolutely agree Your Honour. No quarrel with that whatsoever. But then the Courts must, in my respectful submission, make sure that they, or try and ensure that that statutory compensation provision does have teeth. Can I just talk about (e) and (f)?

WINKELMANN CJ:

We are not going to stop you now Mr Galbraith.

MR GALBRAITH QC:

With the greatest respect, and perhaps just going back to how I understand this arose and my learned friend referred, I think he referred to Mr Woolford raising, it was actually Mr Broadmore of course who raised it, but Mr Broadmore tells me that he recognised that in the printed authorities that they had the old unamended sections, so he took down copies of the amended section, offered them to the Court, and the Court said, no, they

didn’t need them, and that’s not surprising, because just as Your Honours have got your screens in front of you, everybody looks at screens these days, and of course the judgment itself sets out the amended section with little (e), doesn’t set out little (f) and the reason, goodness knows what the reason of that is, it’s not that they didn’t know it was there but it wasn’t argued, and my learned friend is quite right that neither little (e) or little (f) were argued by Stonehill. In my respectful submission it’s hardly surprising they weren't argued because if one looks at little (e) and you see the public policy it’s covenants, the wording is, “…covenant is contrary to public policy or to any enactment or rule of law…” We’re talking public policy at a high level. Covenants contrary to public policy, contracts contrary to public policy, well known category. It certainly doesn’t encompass what individual councils decide to do with their zoning. This is high level enactments. Public policy rule of law and as I said before rule of law one would think is one complies with a contractual obligation registered on title. So I don’t, with great respect, think anybody would have thought they could run an argument under little (e). I certainly wouldn't have thought I had run an argument under little (e).

Little (f) is the just and equitable. That’s only if none of the other grounds apply. Again, with the greatest respect, just and equitable is areas where we get it, of course, when we get it in insolvency. We get it in wills. We get it in those sort of areas. It’s very personable, or personality just and equitable if I can put it that way. It’s getting behind the screen of the corporation or the entity looking at the individual merits. Again it’s, with respect, a very unlikely candidate for a situation such as this one where a public company has with full knowledge, coming to the covenant, with full knowledge of the covenant, chosen to go ahead and continued to go ahead despite knowing of an appeal, just doesn’t, with great respect, strike me as the sort of course where I, if I couldn’t succeed on the other grounds, I would be arguing just and equitable. Either you get home on the other grounds or you’re not going to get home at all. So despite the fact that the appellant suggests that this is highly relevant, and makes the absence of consideration of that grounds specifically, or absence of argument on that ground specifically, undermines the Court of Appeal decision I think, with my respectful submission, that

Your Honours stand back and think about it, neither (e) or (f) would have got the appellant anywhere had they been argued.

GLAZEBROOK J:

I think I agree totally on (e), which is why I was putting to you really that I don't see that either (e) or (f) or the new evidence actually makes terribly much difference, but (f) possibly in the sense that, not the fact they've gone ahead and built a milk factory that you might say, well, the minor benefit possibly that you get from this covenant, given the change in zoning, makes it just and equitable, so possibly, but then as you say, if you didn't get home on the zoning change then that's not going to be an issue in any event. But I suppose my question is that I still see, even if you say well they can't argue (e) or (f) and they can't argue the new evidence, and I do have a bit of difficulty with them going back with new evidence having failed and been bound by the Court of Appeal, so why, is there any other new argument they're having that you say they're trying to make now that they didn't make in the Court of Appeal, leaving aside (e) and (f) and the new evidence?

MR GALBRAITH QC:

The undertaking would be the other matter.

GLAZEBROOK J:

No, sorry, including new evidence being the undertaking.

MR GALBRAITH QC:

Yes, so we, the respondent faces the possibility of all of those three, plus –

GLAZEBROOK J:

But what's – have you answered why there isn't an issue of principle just generally in terms of the Court of Appeal decision? Is the answer just, well, they were just applying what is quite clearly the law to the facts?

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

Right.

MR GALBRAITH QC:

To put it bluntly, yes.

GLAZEBROOK J:

Yes, that's what I understood, I just wondered if there was something more.

MR GALBRAITH QC:

And can I just point out also in relation to my proposition that this should go back and start again, is that there are two appeals that weren't of course determined by the Court of Appeal, is the compensation appeal and there's a cost appeal, and I know the cost appeal is relatively minor, but there's a compensation appeal, so we've got that untidiness also. If the appeal, if Your Honours did grant leave, it did come to the Supreme Court, that's the Supreme Court stage of the Court of Appeal judgment, well that's not a problem. If the Supreme Court changed the Court of Appeal result, well then there's a compensation appeal and my respectful submission would be we'd all have to go back to square 1 because we've now got a different party than the party that was party to the original compensation hearing, and we have different circumstances therefore the Court would have to take into account in compensation so it would be back at, on compensation, it would have to go back to square 1. I guess my, I'm trying to be practical and efficient, is that well it's really better if we have all these loose ends that we tidy them up by starting back at square 1 and it'll come through and it can be dealt with substantively without –

GLAZEBROOK J:

But wouldn't that have to be on the basis that your client didn't take the res judicata abuse of process points?

MR GALBRAITH QC:

Yes, I –

O'REGAN J:

But the High Court would be bound by the Court of Appeal.

GLAZEBROOK J:

That's the problem.

O'REGAN J:

So I just can't see the point of going back and starting again.

MR GALBRAITH QC:

Well, they wouldn't be bound by the Court of Appeal in (e) and (f), because (e) and (f) wasn't argued in the Court of Appeal, and my friends want to argue (e) and (f). They wouldn't be bound because of the undertaking. That's new. And they would produce whatever new evidence Mr Clement and the planner's evidence, so there appears to be a whole lot of new evidence, for example, the written submissions refer to the number of people going to be – that's all stuff which is in Mr Clement's evidence, so it looks to me like a different case, which is why I don't think abuse of process would succeed for the respondents, even if the respondents did run it, Your Honour, and I certainly hadn't turned my mind to that thought because it does seem that the facts have moved enough since the Court of Appeal judgment that Synlait could justify starting afresh.

WINKELMANN CJ:

Are those your submissions Mr Galbraith? Thank you. Mr Miles, did you want to exercise your right of reply?

MR MILES QC:

I wasn't anticipating my friend stopping quite so quickly. Just perhaps five quick points Your Honour. My friend did continue to maintain that this was essentially a factual issue and that the principles had been established in the Courts below, and there was some agreement on that. You've heard my submissions on that point but I just want to make the obvious point there, Your Honours, that the principles, of course, are crucial because they provide

the legal tests and the framework within which the facts operate. If, as I say, the judgment sets out a series of tests, starting at 73 and moving through to approximately 110, to 115 perhaps, a series of tests as to how each of those sections should have been approached and what factors should or should not be considered relevant. By the way, I know I didn't touch on them, perhaps in my submissions, there are a number of factors that Justice Woolford took into account which the Court of Appeal said were irrelevant such as future use. Now putting aside issues of whether future use is sufficiently able to be proved, there's not the slightest reason under the section why future use, as such, should not be a factor. It's just another example of diktats laid down in the judgment about what factors should or shouldn't be taken into account. So it's crucial, Your Honour, whatever views you have, or however we determine the issues that arise out of substitution, and our application for further evidence, this judgment, if Your Honours are with me on the criticisms of the judgment, we have to have the right to appeal, so obviously we'd obviously comply with the other requirements.

Secondly, there is no new case or propositions that we're advancing, that I'm aware of, other than the new evidence and (e) and (f). (e) and (f) are a matter of law. They're there. The new evidence, my suggestion, Your Honours, if you're with me on the leave application, perhaps the most effective way of dealing with the new evidence application is not to make a final decision now, but to adopt what, certainly the usual practice in the Court of Appeal, and I imagine it probably is here, that new evidence applications will be dealt with at the hearing of the substantive appeal. But at any rate by that stage Your Honours will have a clearer idea of quite how they fit into the overall pattern of the case. My take on it is that the only issues really are the undertaking and a few paragraphs in the Chief Executive's affidavit that just says that we can deal with dust. Neither of those issues would seem to me to be conceptually different to the evidence that was before the Court. Of course it's new evidence, technically, but it's not new evidence in the sense that the Courts have rejected in the past, because it's not fresh. It is fresh so far as Synlait is concerned because it wasn't able to run that evidence. It accepted that whatever, it just essentially abided the decision of whatever

Stonehill chose to argue. But we're not dying in those particular ditches on our fundamental argument that the judgment, independently of those issues, are so flawed that leave should be granted.

Just a minor point Your Honour, but it has troubled me from day 1, and it slightly troubled my friend I think. At paragraph 71 of the Court of Appeal judgment they actually set out paragraph 317 and include (e) and they don't include (f). There's a whole series of dots. I simply do not understand why that happened but it certainly confirms that they weren't taking them into account, and whether they're argued or not, in my submission, when you set out, purport to set out a series of tests, particularly the paragraph 73 and 74 test, adopting Justice Ronald Young's views as in 2003, then you must have in mind the ongoing relaxation of grounds and relaxation of how you approach discretion. So there's that minor point. More importantly this issue is starting again. I'm deeply concerned about that suggestion Your Honour. I'm not even sure what standing Stonehill would have anymore. They're out –

O'REGAN J:
Stonehill or Synlait? Are you talking about Stonehill or Synlait?

MR MILES QC:
Yes, well Synlait has obviously got standing.

WINKELMANN CJ:
Well Mr Galbraith's suggestion I think is that Synlait starts again.

MR MILES QC:
Well, but then we have the judgment sitting there with all the problems of res judicata, not to mention inefficiency of the Court process. I'm bound to say, Your Honour, whether – let me tell you the proposition. This issue is a significant one for Synlait. It's a listed company, there's been considerable publicity, and it's an issue which really from a commercial point of view it really needs to be determined a soon as practicable. Now I quite understand what my friend would say to that proposition. He'd say, well it's your fault. You

went ahead assuming that you would get home on it. But in the commercial world it happened. I explained that it happened in a sense of good faith, they went ahead on advice and they thought that the requirements had been established, and they were correct in the High Court, and we say the Court of Appeal judgment is wrong. But the reality, Your Honour, is that this is an issue which should not be left, I suppose, hanging on the basis that we now go back and start again. This is an issue which does need to be addressed by this Court.

O'REGAN J:
It would allow a more orderly – I mean if there weren't res judicata and precedent problems it would be better for the issue if it does finally get to this Court.

MR MILES QC:
Quite.

O'REGAN J:
Got here in a way that the Court had the benefit of the judgments of lower Courts on these issues.

MR MILES QC:
In a perfect world, Your Honour, I agree. But on the other hand the, if we just separate it for the moment, (e) and (f) from it, then it's a perfectly standard appeal and I obviously it's implicit in my submissions that independent of (e) and (f) we've established a number of arguable errors that would enable these issues to be dealt with in an entirely conventional way by this Court, and it's crying out, we would say, for that sort of reassessment, and it's – but as it happens it's also important commercially from our client's point of view that it be dealt with by this Court. But on the bigger picture, which of course is what would perhaps have greater clout if you like for this Court, on the big picture all of the issues that I've been talking about are all issues that arose specifically in the Court of Appeal judgment, and the High Court judgment, and can be addressed in an entirely conventional way in the Supreme Court.

If things get a bit muddled, blurred, about the new evidence and the implications of that, that will be able to be dealt with by whatever fine tuning is needed as part of the conditions of the consent, whatever it might be. But I don't believe that ultimately that those issues will have any bearing on the substantive attack on the judgment, which is what we say is essential to be overturned. Or at least we be given the opportunity to overturn it.

Unless there's anything else that concerns Your Honours, that's all I was proposing to say.

WINKELMANN CJ:
Thank you Mr Miles. We'll take some time to consider this and let you have our decision on leave in due course.

COURT ADJOURNS: 11.37 AM