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## ENVIRONMENT/ RESOURCE MANAGEMENT

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## NO COMPLAINTS COVENANTS POTENTIAL SETTLEMENT TOOLS

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Associate Judge Gendall recently upheld the use of “no complaints covenants” under the Resource Management Act 1991 (RMA), highlighting their potential as useful tools for resolving disputes between opposing parties on applications for resource consent.

In *South Pacific Tyres New Zealand Limited v Powerland (NZ) Ltd* (CIV 2008 – 485-427), the High Court in Wellington dealt with an application for summary judgment in relation to the specific performance of a requirement that the defendant register a transfer, creating a restrictive covenant against property that the defendant owned. The covenant would have prevented the landowner from exercising rights he or she would otherwise have had to complain about, or take enforcement action on, the effects of the neighbour’s land use. The court considered whether this covenant, broadly termed a “reverse sensitivity covenant” or “no complaints covenant”, contravened the RMA and whether it was illegal under the Illegal Contracts Act 1970 and the New Zealand Bill of Rights Act.

### The Bill of Rights

The court upheld the earlier decision in *Rowell v Tasman District Council* [1997] NZRMA 241<sup>1</sup> that there is nothing in the New Zealand Bill of Rights Act (the Act) to stop an individual giving up or limiting the

exercise of any of his or her affirmed rights. As long as the landowner had freely consented on an informed basis to the imposition of the condition, the Act would not be breached, despite the fact that the landowner’s affirmed right would be given up or limited.

### Successors in title

On the issue of successors in title, the court in *Rowell* had not been concerned that the successor would have their rights restricted by the condition and covenant because, when purchasing the property, full notice of the restriction would be available on the title. A prospective purchaser would not buy the property if it was unwilling to live with the covenant. A similar position was taken by the High Court in *Christchurch International Airport v Christchurch City Council* [1997] NZRMA 145. In *South Pacific Tyres* the court remained of this view.

### The covenant’s true effect

The court also held that the effect of the covenant was not to oust the jurisdiction of the court in such a way that it breached the common law as saved by section 11(1)(b) of the Illegal Contracts Act. The judge expressed the view that the true effect of the covenant was more akin to a settlement

<sup>1</sup> Andrew Beatson was Counsel for Tasman District Council

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agreement between parties in dispute. The defendant waived the right to complain under the RMA (among other things) in return for the plaintiff consenting to the residential dwellings. The Environment Court may still hear applications under s.316 of the RMA and issue enforcement orders under section 314 of the RMA, but the effect of the covenant is that the defendant has surrendered the right to be the person who brings such an application.

### Can an individual give up their rights under the RMA?

The next question was whether that right may be waived by a potential defendant. The court considered and upheld the decisions in *Christchurch International Airport* and *Rowell*. While the court was persuaded that *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601 (CA) was authority for the proposition that people cannot be compelled to give up their rights under the RMA, it was of the view that those participating under the RMA can waive their own rights if they freely contract to do so. The court accepted the decision in *Rowell* and held:

“I am likewise satisfied that reverse sensitivity covenants like the covenant in this case do not contravene the principles or provisions of the RMA. In my view the rights to public participation in the RMA can be waived by an individual giving free and informed consent – as, clearly, the defendant here did.

On an individual level, a person can benefit directly from being able to waive such rights in order to obtain consent to develop their land as they so desire.” [paras 61 and 62]

In essence the court held that such a covenant did not allow the plaintiff to contravene the RMA or remove the possibility of RMA duties being enforced.

It only precluded the defendant and its successors in title from complaining.

### The decision's impact

This case reinforces the acceptability of no complaints covenants entered into under the RMA. While the legal position is clear that such covenants cannot be imposed unilaterally, providing they are agreed to between the parties, there is no reason why they cannot be used as a mechanism to mitigate potential adverse effects. They are therefore a valuable tool in settling disputes between parties by creating a benchmark for future activities.

It is somewhat ironic that in the early 1990s the Ministry for the Environment opposed submissions seeking the inclusion of no complaints covenants as potential tools to address adverse effects in first generation district plans under the RMA. The significance of the decision in *South Pacific Tyres* is that sensitive activities can be buffered or separated across boundaries from what may be incompatible activity by the use of such covenants. This has particular relevance in rural areas where lifestyle living is undertaken alongside the use of land for productive purposes.