PROPERTY LAW NEWS

AUGUST 2019

WELCOME

to Issue No. 2 of Property Law News, Bell Gully's monthly digest on regulatory developments, together with cases and news of interest in the **property** and **construction** sectors.

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BELL GULLY

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Need more information?
The Property Law News is a monthly digest on regulatory developments, together with cases and news of interest in the property and construction sectors.

There will be no Property Law News in September, It will resume in October.

For more information, please contact Sonia Ng, or your usual Bell Gully contact, or visit our website.

CASE NOTES

✱ PROPERTY

Court reinstates covenants that restrict development of high value dairy plant

New Zealand Industrial Park Limited v Stonehill Trustee Limited [2019] NZCA 147

THE COURT OF APPEAL HAS RELEASED ITS JUDGMENT SUSTAINING COVENANTS THAT RESTRICT THE DEVELOPMENT OF SYNLAIT'S POKENO LAND, WHICH WILL PARTICULARLY AFFECT SYNLAIT'S CONSTRUCTION OF ITS CIRCA $250MILLION POKENO DAIRY PLANT.

In summary: Land covenants on a title can restrict a landowner's use or development of their property. As the proceedings in this case demonstrate, once land covenants are noted on a title, it can be difficult to modify or remove them.

Synlait commenced construction of its circa $250million dairy plant in Pokeno, in breach of land covenants that the land was subject to. The covenants require the land only be used for grazing, lifestyle and/or forestry. The covenants also prohibit the landowner from complaining against any adverse effects which might arise from quarrying activities undertaken on the land that benefits from the covenants.

Stonehill Trustees Limited (**Stonehill**), the then-owner of the land that Synlait was constructing its dairy plant on, tried to negotiate a surrender of the covenants with New Zealand Industrial Park Limited (**NZIPL**), the owner of the land that benefits from the covenants. NZIPL refused, and Stonehill filed an application to the High Court to remove the covenants. Late last year the High Court issued a judgment ordering removal of the covenants. Synlait then took title to the land.

However, this year the Court of Appeal overturned the High Court judgment, and reinstated the covenants.

Synlait has applied for leave to appeal the decision to the Supreme Court. The Supreme Court has advised there will be an oral hearing before a decision is made on whether it grants Synlait's bid to appeal.

Commentary: The legal process for modifying or removing land covenants is contained in the Property Law Act 2007 (**PLA**). A person bound by the covenant can apply to the Court to modify or extinguish it.

The Court must have regard to criteria set out in the PLA when considering whether to remove or extinguish land covenants. The criteria outlined in the PLA include:

- Whether the covenant ought to be modified or extinguished because of a change, since its creation, in all or any of the following:
    - The nature or extent of the use being made of the land affected by the covenants;
    - The character of the neighbourhood;
    - Any other circumstance the Court considers relevant;

- Whether the continuation of the covenant would impede the reasonable use of the affected land in a different way, or to a different extent, from what could reasonably have been foreseen by the original parties to the covenant at the time of its creation;
- Whether the proposed modification or extinguishment will substantially injure any person entitled.

In Synlait's case, the Court of Appeal judgement has highlighted that though "change" is a common denominator in the criteria that the Court must consider, it is not enough that changes have occurred. The change is most likely to be relevant if it has changed the benefit or disadvantage flowing from the covenant, such that the covenant "ought" to be modified or extinguished. The focus is not on the change itself, but rather on the impact that the change has created in justifying the covenant should be modified or extinguished.

When the case was before the High Court, the judge considered the rezoning of the affected land, and further proposed zoning changes to the area, together with a dramatic change in the character of the neighbourhood (Pokeno has undergone significant growth since the covenants were created, with new residential subdivisions populating the area), justified the removal of the covenants.

The Court of Appeal disagreed. It drew attention to the fact that the covenants were created for a term of 200 years, or until quarrying ceases. Some changes must have been contemplated when the covenants were created. None of the changes that the High Court considered were, in the Court of Appeal's view, relevant or sufficient to justify the removal of the covenants. Regardless of the zoning of the land, NZIPL continued to benefit from the covenants, particularly if it wished to proceed with plans to quarry its land. If the covenants were removed, Synlait would be permitted to establish its dairy plant, and a range of other developments could (with appropriate consent from local authorities) be allowed to establish on the land burdened by the covenants. This all likely to have the impact of making it more difficult for NZIPL to apply for resource consent to quarry its land.

In the Court of Appeal's view, NZIPL continued to enjoy the same benefits from the covenants, despite the changes in Pokeno's zoning and neighbourhood. The Court of Appeal reinstated the covenants and overturned the High Court decision.

Synlait has sought leave to appeal the decision to the Supreme Court, so the last word on this matter remains to be seen should Synlait's bid to appeal be granted.

Although the inquiry is highly dependent on the individual facts of each case, the Court of Appeal decision in the meantime demonstrates the danger of underestimating the complexities involved with modifying or extinguishing land covenants, with Synlait's construction of its dairy plant well underway before the covenants were or could be removed.

Before purchasing property, it is always prudent to have your lawyer check over the agreement and matters of title to see if there are any adverse interests on the title that may affect your intended use or development of the land.

Bell Gully advises regularly on all aspects of property law, including title reviews and due diligence on property purchases. Please contact one of our property lawyers if you have an issue that requires attention, and we would be happy to assist.

Does arbitration clause in lease bind new property owner?
Wai-iti Developments Limited v General Distributors Limited [2019] NZHC 1656

In summary: This case concerned whether Wai-iti Developments Limited (**Wai-iti**), which is owned by Foodstuffs (the operator of the "Pak'n'Save" brand supermarkets) is bound by an arbitration clause in a lease, when it acquired land that is tenanted by its competitor Countdown (**the Countdown site**).

Wai-iti has plans to develop a new Pak'n'Save supermarket on land immediately bordering the Countdown site. General Distributors Limited (**GDL**), which operates supermarkets under the "Countdown" brand, was and remains the lessee of the Countdown site under a lease that commenced in 1998 (**the Lease**). Wai-iti acquired the Countdown site subject to the Lease.

GDL objected to Wai-iti's development of a Pak'n'Save supermarket next to the Countdown site.

GDL pointed out that the Lease contained a covenant that precludes Wai-iti from developing a supermarket on the site, if the supermarket would exceed in area twenty percent of the gross lettable area of the specialty shops that are currently on the site.

Wai-iti did not dispute there is such a covenant in the Lease, nor did it dispute their proposed new Pak'n'Save supermarket would exceed the area specified in the covenant. Wai-iti's argument was that they never agreed to and were not bound by the covenant (**the Dispute**).

At issue in this case was whether Wai-iti must refer the Dispute to arbitration.

The Lease contained a clause requiring that any difference, dispute or disagreement about the interpretation or application of the Lease shall be determined by arbitration. Again, Wai-iti contended that it was not bound by the arbitration clause, and was entitled to submit the Dispute to the court (the media reported that Foodstuffs general manager would like the Dispute heard in the public forum by way of court proceedings, as she believed "*the public has the right to know about the benefits of increased competition.*").

GDL disagreed and contended that Wai-iti was bound by the arbitration clause, and was therefore required to submit the Dispute to arbitration (where the arbitral proceedings and results will be kept confidential).

Decision: The High Court decided in favour of GDL, and referred Wai-iti's claims to arbitration in accordance with the arbitration clause. The Court's key reasoning included:

- On an initial assessment of the submissions and the relevant law, it was at least arguable that the arbitration clause is binding on Wai-iti. For leases entered into before 1 January 2008 (which include the Lease in this case), only lease covenants that "touch and concern" the land shall bind someone who purchased the land from the landlord.

- The Court only needed to undertake an initial assessment (rather than a "full" assessment of all the available evidence and submissions) on the question of whether the arbitration clause is binding on Wai-iti. If satisfied that the clause is arguably binding, the Court must refer the question and the Dispute for final determination by arbitration.

- The arbitration clause arguably "touch and concern" the land either (1) because it is "interlinked with" other covenants in the Lease that themselves "touch and concern" the land, or (2) because the arbitration clause affects the landlord in its normal capacity as landlord and the tenant in its normal capacity as the tenant.

- For completeness, the Court summarised that to "touch and concern" the land, a lease covenant imposing an obligation on the landlord must:

    - Benefit only the tenant for the time being, and if separated from the term ceases to be beneficial to the tenant;

    - The covenant affects the nature, quality, mode of user or value of the leased premises; and

    - The covenant is not expressed to be personal.

- Having concluded that the arbitration clause arguably "touch and concern" the land and thus was arguably binding on Wai-iti, the Court referred Wai-iti's claims (including its contention that it is not

bound by the arbitration clause and the lease covenant prohibiting it from developing its new Pak'n'Save supermarket) for final determination by arbitration.

Commentary: There are not many cases that explore whether an arbitration clause is a lease covenant that "touch and concern" the land. This case has relevance for the substantial number of leases containing arbitration clauses entered into before 1 January 2008. This case sets out that an arbitration clause could arguably "touch and concern" the land and thus bind someone who purchased the land from the landlord. Where an arbitration clause arguably is binding, the Court is obliged to refer disputes between the parties to arbitration in accordance with the clause. This could adversely impact a new landlord who was under the belief that it could freely choose which dispute resolution mechanism to use in the event of dispute or difference with the tenant.

As always, each case will turn on its own facts, and how the lease or clause in question was drafted. If you are purchasing a property subject to a lease, then obtaining appropriate legal advice is always helpful to understand how you are affected by the lease terms.

■ CONSTRUCTION

Options if you disagree with an adjudication determination
Condor International Limited v Steelhaus 2014 Limted [2019] NZHC 296

In Summary: Parties to a "construction contract" can refer any dispute arising from the contract to adjudication under the Construction Contracts Act 2002 (**the CCA**). The adjudication procedure under the CCA can be broadly described as a "pay now, argue later" procedure, designed to be a prompt process to maintain money flows in projects while parties are free to work through more formal dispute resolution procedures (such as arbitration).

As this case highlights, when a party to a construction dispute disagrees with the adjudicator's determination, it has three broad options to challenge the determination:

1. Apply to the High Court for judicial review of the decision – however, the threshold is high and is likely granted only if there was a significant breach of natural justice or significant error of law with the adjudication determination;
2. Proceed with another form of dispute resolution process;
3. Litigate the issue in Court, which can be time consuming and expensive.

This case concerned two parties, Condor International Limited (**Condor**) and Steelhaus 2014 Limited (**Steelhaus**), who went to adjudication under the CCA due to a dispute over payments. The adjudicator ordered Condor to pay $105,327.08 to Steelhaus.

Condor contended that the adjudicator's determination is amenable to judicial review because the adjudicator erred in law in two particular respects, and/or exhibited bias in favour of Steelhaus. Steelhaus claimed the adjudication determination was binding.

For completeness, the two respects that Condor argued the adjudicator erred in were (1) the adjudicator wrongly determined that the contract was not a residential contract, and (2) the adjudicator wrongly found there was only one contract, where there was a contract for the supply of materials and a separate contract for the installation of those materials.

The Court reiterated that an adjudicator's determination is amenable to judicial review only in a limited range of cases. It will not be easy for an applicant to demonstrate that the Court should intervene in an adjudicator's determination, given the CCA's core objective in facilitating cash flows whilst parties work through more formal dispute resolution mechanisms. It is unlikely that errors of fact alone by adjudicators will give rise to a successful application for judicial review.

In this case, the Court found Condor's claims in essence was that the adjudicator made findings of fact without sufficient evidence to support those findings. In the Court's view, far more would be necessary to justify that the adjudicator was biased against Condor, particularly in the context of a fast-track proceeding such as a CCA determination hearing.

These hearings and decisions typically take place within tight timeframes, where the adjudicator make their findings based on assessment of the evidence as a whole, including such inferences as may reasonably be drawn from the evidence. In the great majority of cases where an adjudicator's determination is to be challenged, the appropriate course will be for the parties to submit the dispute to binding resolution through arbitration or litigation.

Bell Gully has lawyers with specialist experience in construction law and procurement projects. Please feel free to contact one of our team if you need assistance with a construction law related matter.

REGULATORY UPDATES

✱ PROPERTY

Changes to residential tenancy laws in force from August

The Residential Tenancies Amendment Act 2019 (**the Act**) received Royal Assent and became law last month.

Most of the substantive changes take effect from 27 August. They will affect residential landlords and tenants in the following ways:

- **Tenant liability for careless damage limited to landlord's insurance excess or 4 weeks' rent**

  If a tenant damages the property due to careless or accidental actions, their liability is limited to the lower of the landlord's insurance excess, or 4 weeks' rent, whichever is the lower. The liability of social housing tenants is limited to the lower of the landlord's insurance excess or 4 weeks' market rent.

  It is unlawful for a landlord to enter into a tenancy agreement that exposes the tenant to pay more than this amount.

- **Landlord to provide insurance details**

  Since tenants' liability for careless damage is now interlinked with the availability of the landlord's insurance, the new laws also require landlords to disclose insurance information in any new tenancy agreement.

  The information that must be provided is whether the premises are insured, and if the premises are insured, the amount of the applicable excess and a statement informing the tenant that a copy of the policy is available on request.

  For tenancy agreements entered into prior to 27 August, landlords must provide the above information "within a reasonable time" after the tenant requests it.

  If any insurance information changes during the tenancy, landlords must provide the correct information to the tenant "within a reasonable time" after they become aware of the change.

- **Premises unlawful for residential use**

  The new laws give the Tenancy Tribunal full jurisdiction to make orders concerning unlawful residential premises. These are premises which are used for residential purposes, even though they could not be lawfully occupied for residential purposes. Illegally converted garages or sleepouts are common examples that fall under this category.

- **Contamination of premises by illegal substances**

  Regulations will be developed to prescribe maximum acceptable levels of contaminants (including methamphetamine), acceptable testing methods and decontamination processes. Landlords will be able to enter the premises for testing by giving at least 48 hours' notice to the tenant, and must notify the tenant of the test results. Once the maximum acceptable levels are prescribed, it will be unlawful for a landlord to knowingly rent out premises contaminated above that level.

Refinements to trust law introduced by the Trusts Bill

Many properties in New Zealand are held in trusts. The law relating to trusts will see major changes with the Trusts Bill (**the Bill**) having received Royal Assent on 30 July and the majority of the changes coming into effect in January 2021. The new law will replace both the Trustee Act 1956 and the Perpetuities Act 1964.

The Bill introduces clarity on aspects such as when trustees must provide information to beneficiaries, the power of trustees to invest trust property and distribute trust property to beneficiaries, and the ability to delegate some of those powers.

The Bill also sets out the rules relating to the transfer of property on the appointment, retirement or removal of trustees, and indemnities available to a trustee if they are liable for any rent or performance under a lease.

✱ CONSTRUCTION

MBIE releases public feedback on major building law reforms

In April, the government released proposals for significant reforms to New Zealand's building laws, in an effort to improve the quality of building work and deliver fairer outcomes when things go wrong. Public consultation on the proposals closed in June. The government has now published a summary of the submissions received. A total of 470 submission were received.

According to the government's summary report, the majority of submitters agreed that system-wide change is needed to the building sector, and supported most of the proposals at a high level.

Areas where there was strong agreement included the proposals to require a guarantee and insurance for all residential new builds and significant alterations, and improving the building certification framework by the provision of information about building products and methods.

Areas where there was strong disagreement included the proposals to establish a new voluntary certification scheme for engineers, as many submitters believed that general competence should be self-regulated by the profession.

Whilst there was strong support for requiring a guarantee and insurance product for residential new builds and significant alterations, there was not much support for allowing homeowners to opt out of being covered. Concerns were noted about the ability of the current insurance market to offer a viable product.

The majority of the submissions also agreed with increasing the maximum financial penalties, as the existing penalties were not considered sufficient deterrence. There was not much support for the proposal to reduce the building levy rate.

In terms of next steps, the government is now working with a range of key partners within the building and construction sector to develop the proposals based on the feedback received. The government is expected to make its first policy decisions on the reform proposals later this year.

Click here for more information

Consultation to improve resilience of buildings on liquefaction-prone ground

The government is seeking public feedback on proposed updates to the Building Code that focus on improving the long term resilience of buildings in liquefaction-prone areas. The proposed updates seek to apply learnings from the Canterbury earthquakes to support safer housing foundations on liquefaction-prone ground. Buildings on these areas will require specifically designed foundations.

The second proposal seeks to streamline the building consent process for light steel framing, which will help housing densification and encourage off-site manufacture, while also giving designers additional material choices.

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Over 120 standards used for Building Code compliance available for free download

Over 120 standards that are used for Building Code compliance are now available to be downloaded and accessed for free. This is a follow-up to a successful pilot by the government offering free download of some important building standards in December 2017.

“I have listened to the building and construction sector, and professional groups who access these standards regularly, and to New Zealand’s homeowners. They want to do the right thing but say financial barriers make it hard – today I am making building compliance easier for all New Zealanders,” Building and Construction Minister Jenny Salesa said in a statement.

“These building standards are ones which directly help demonstrate compliance with the New Zealand Building Code. They ensure our buildings and homes are safe and well-constructed.

“They will help building professionals and homeowners with methods for designing and constructing timber framing in buildings and selecting appropriately treated timber used in building work. They will also help engineers with earthquake loads on buildings,” said Jenny Salesa.

The standards are available through the Standards New Zealand website.

OTHER NEWS

✱ PROPERTY

New planning approach to foster growth of cities

Urban Development Minister Phil Twyford and Environment Minister David Parker has released the proposed National Policy Statement on Urban Development for consultation.

Twyford said a new approach to planning was needed as the current system is overly restrictive, and creates an artificial scarcity of land that drives up housing prices. The new approach proposes to remove restrictions on the development of higher density housing, such as apartments, to cater for continued

population growth. It aims to do this in part by directing councils – specifically in cities like Auckland, Hamilton and Christchurch – to free up their planning rules and make room for growth in suitable areas.

Included in the proposal is also the removal of councils' ability to regulate car parking requirements. This encourages councils and developers to consider car parking as a shared resource because high density areas are likely to see a rise in traffic and the need for more car parks.

Auckland mayor Phil Goff welcomed the proposal, but noted the risk in planning for growth without considering the funding available. "We need some degree of revenue sharing if the government wants Auckland to take more of a role in urban development," said Mr Goff.

Click here for more information

✱ CONSTRUCTION

Board members announced for new Infrastructure Commission

The Infrastructure Commission to be set up via a Bill currently before Parliament is envisaged to have two broad functions – strategy and planning, and procurement and delivery support for major infrastructure projects across New Zealand. "It will also be a one-stop shop for investors, including publishing a pipeline of infrastructure projects", said Infrastructure Minister Shane Jones when the Bill had its first reading in Parliament earlier this year.

This month Minister Jones has announced the board members for the Commission, as the Commission will be an autonomous Crown Entity with an independent board. Former Reserve Bank governor Dr Alan Bollard has been appointed as the Commission's chairman, and Jon Grayson, current Deputy Secretary Financial and Commercial at the New Zealand Treasury, has been appointed by the board as chief executive. The Commission is on track to be operational by October this year.

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BELL GULLY PROPERTY TEAM

Andrew Petersen
PARTNER
DDI +64 9 916 8622 MOB +64 21 684 533
andrew.petersen@bellgully.com

Jane Holland
PARTNER
DDI +64 9 916 8983 MOB +64 21 706 129
jane.holland@bellgully.com

David Chisnall
PARTNER
DDI +64 4 915 6966 MOB +64 27 594 8505
david.chisnall@bellgully.com

Ian Becke
PARTNER
DDI +64 9 916 8795 MOB +64 21 804 096
ian.becke@bellgully.com

Karl Anderson
PARTNER
DDI +64 9 916 8845 MOB +64 21 661 726
karl.anderson@bellgully.com

AUCKLAND VERO CENTRE, 48 SHORTLAND STREET
PO BOX 4199, AUCKLAND 1140, NEW ZEALAND, DX CP20509
TEL 64 9 916 8800 FAX 64 9 916 8801

WELLINGTON 171 FEATHERSTON STREET
PO BOX 1291, WELLINGTON 6140, NEW ZEALAND, DX SX11164
TEL 64 4 915 6800 FAX 64 4 915 6810

BELL GULLY