IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2020-404-000114
[2020] NZHC 2919

UNDER	Section 316 of the Property Law Act 2007
AND	
IN THE MATTER	Of an application to modify a restrictive covenant
BETWEEN	PARKLANDS PROPERTIES LIMITED Applicant
AND	AUCKLAND COUNCIL First Respondent
AND	FRANCIS MILES REYNOLDS and JULIET LINELL REYNOLDS as trustees of the F & J REYNOLDS TRUST Second Respondents
AND	RICHARD NORMAN REYNOLDS and KIRSTEN SUZANNE REYNOLDS Third Respondents

Hearing:	29 June 2020 – 01 July 2020
Appearances:	J M Savage for the Applicant B Ford for the First Respondent D M Salmon and D A C Bullock for the Second and Third Respondents
Judgment:	5 November 2020

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 05 November 2020 at 4.00pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Introduction

[1] This case concerns a dispute between property developers over their respective plans to develop land on the Hingaia peninsula. The Hingaia peninsula is situated west of Papakura and the Southern Motorway and has been identified for a number of years as an area for residential development.

[2] The applicant, Parklands Properties Ltd (Parklands) applies, pursuant to ss 316 and 317 of the Property Law Act 2007 (PLA 2007), for an order extinguishing right of way and service easements in favour of the second respondents, Francis and Juliet Reynolds, as trustees of the F & J Reynolds Family Trust, and the third respondents, Richard and Kirsten Reynolds.

[3] The second and third respondents (the Reynolds interests) own properties at 65 Hinau Road and 46 Ngakoro Road which share a common boundary with Parklands' land at 72 Hinau Road. The easements are over a 400-metre long, 10 metre-wide[1] strip of land which is the only street access to 72 Hinau Road. It is also the driveway to the house at 65 Hinau Road, which had formerly been the family home of Francis and Juliet Reynolds and which they and their children still use regularly, although they also have other residences.

[4] Parklands needs the easements extinguished to comply with the conditions of its resource consent to subdivide and develop 72 Hinau Road. The conditions require the vesting of the land subject to the easement in the Auckland Council so the land can form one side of a 20-metre wide public road envisaged in the Auckland Unitary Plan. Unless the easement land is vested, Parklands cannot sell the lots created by its subdivision.

[5] The other side of the planned public road, over which Parklands previously had equivalent easements, is already a road and has vested in the Auckland Council as part of a development the Reynolds interests undertook of land to the west of the road (the Karaka Lakes development). Parklands gave its consent to the extinguishment of its easements over what was then the Reynolds interests' land at no cost.

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1 The width and length dimensions given are approximate dimensions only.

[6] No services are provided to 65 Hinau Road or to 46 Ngakoro Road from the easement land. Richard and Kirsten Reynolds access 46 Ngakoro Road from that road and not from the easement land. Francis and Juliet Reynolds could access 65 Hinau Road from the street they put in place as part of the Karaka Lakes development and which runs directly beside the easement land. Even so, the Reynolds interests have refused to consent to the extinguishment of the easement and oppose Parklands' application.

[7] Francis and Juliet Reynolds value the ambiance of the driveway they had established on the easement land. They installed gates at each end of the driveway and, along its border, have planted plane trees, some of which are now scheduled as notable trees in the Auckland Unitary Plan. They do not welcome the prospect of a major road being developed over the easement land and the parallel street they established because they say the road and the development it would service would have adverse consequences for their family enjoyment of their house.

[8] The Reynolds interests also say that extinguishment of the easements would negatively affect the value they could realise from the development of their land because of the effect the increase in the supply of properties from the Parklands development would have on the property market.

[9] Parklands says there is no detriment to Francis and Juliet Reynolds, who will be able to access their property and obtain services from the widened public road which has been envisaged in the Auckland Unitary Plan, the relevant provisions of which companies controlled by the Reynolds interests played a major part in shaping. Parklands also says Richard and Kirsten Reynolds will suffer no detriment because they access their property and obtain services to that property from Ngakoro Road.

[10] Except for the offer of a contribution towards legal costs, Parklands has not offered the Reynolds interests any compensation for the extinguishment of the easements. Parklands says no compensation should be paid because there will be no negative effects on the Reynolds interests if the easements are extinguished and that the extension of Hinau Road will be a benefit to the Reynolds interests.

[11] The Reynolds interests say that if the easements are extinguished they are entitled to be compensated for the loss of the driveway and that the compensation should reflect the detriment to the development potential of their land and a fair proportion of the increase in value of the Parklands land. They say the compensation should be of the order of $7,700,400.[2]

[12] Parklands has already completed much of stage one of its development and wants to start releasing the lots for sale. For that reason, Parklands attaches considerable urgency to its application. However, that urgency is largely the consequence of Parklands choosing to commence its development before resolving its dispute with the Reynolds interests over the easements.

[13] The first respondent, the Auckland Council, did not make submissions and said it would abide the Court decision.

Relevant background

[14] In 1999, a block of land on the Hingaia peninsular known as the McCallum block, was subdivided into lots. Two lots were created at the southern end of the block and were accessed down a 20-metre wide, 400-metre long panhandle of land which ran from the then-end of Hinau Road. The panhandle land was subject to an easement in favour of each lot granting vehicular right of way over the panhandle, including the right to establish and maintain a driveway over the land subject to the easement. One of the two lots contained the old McCallum homestead known as Villa Rosa.

[15] In 2004, the two lots and the panhandle land were put up for sale by tender. Joseph Noma, the director and a shareholder of Parklands was the successful bidder. Karaka Lakes Ltd, a company controlled by Francis and Juliet Reynolds, was an unsuccessful bidder. However, Mr Noma and the Reynolds then agreed to complete

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[2] The submissions of Mr Salmon, counsel for the Reynolds interests, and the compensation calculations advanced by Mr Dunlop, a valuer who gave evidence on behalf of the Reynolds interests, put the Reynolds interests' claim for compensation at $8,070,000. However, the figures used by Mr Dunlop in his compensation calculation differ from the figures he used when calculating the value of 72 Hinau Road with no access issues and its value with access issues unresolved. Since the latter figures were used by Mr Dunlop in his valuations and were also used by Mr Dunlop when making adjustments to take into account actual costings used by Mr Stevenson, a valuer who gave evidence for Parkland, I have used the figures in Mr Dunlop's valuations.

the purchase together. The purchase was settled in the names of Parklands and Karaka Lakes as tenants in common.

[16] Under an agreement dated 12 May 2004 (the partition agreement), Mr Noma, Parklands and Karaka Lakes agreed to adjust the boundary between the two lots to achieve two lots of the same monetary value, with Area A, which included Villa Rosa, to go to Karaka Lakes and Area B to go to Parklands. The panhandle land, called Area C, and a strip of land running from the southern end of the panhandle providing access to Area A, called Area D, were excluded from the valuation exercise carried out to give effect to the partition.

[17] Under the partition agreement, the parties agreed to continue "to fully cooperate with each other in obtaining local authority consent" to a plan of subdivision to obtain separate titles for Areas A, B, C and D, and Karaka Lakes agreed to contribute half the costs of developing areas C and D into a formed road if the Council required the road to be formed.

[18] Under cl 8 of the partition agreement the parties agreed that following partition they would "continue to cooperate in good faith to co-ordinate their separate developments on each partitioned piece of land", including the extension of services and roading to the expected boundary between their two properties, "… so as to harmonise the two developments to the mutual advantage of both parties." However, cl 8 also provided that the provision did not create binding legal obligations between the parties unless they determined to enter into a further agreement.

[19] In October 2006, the Papakura District Council granted resource consent to Parklands to adjust the boundaries between the two lots. New certificates of title were issued in respect of the land purchased by Karaka Lakes (Lot 1) and the land purchased by Parklands (Lot 2). The approved survey plan recorded that each lot included parallel adjacent 10-metre wide strips making up the panhandle land and reciprocal rights of way and services easements over the two strips in favour of the other Lot. The resource consent recorded that the S-shaped boundary between Lots 1 and 2, which was the consequence of the boundary adjustment, did not predetermine any future road alignment under the Hingaia Development Plan.

[20] In 2007 Parklands and Karaka Lakes each granted the other a further right of way easement over its panhandle land and also granted easements allowing that land to be used to convey electricity, water, gas, and telecommunications and electronic media (the services easements).

[21] In April 2007, Parklands agreed to sell Lot 2 to Karaka Business Park Ltd, another company controlled by the Reynolds family. Karaka Business Park paid a deposit of $2,000,000 to secure the purchase and, on 31 March 2008, paid a further deposit of $500,000 to extend the settlement date to 31 July 2008. However, because of circumstances related to the Global Financial Crisis, Karaka Business Park was unable to settle the purchase on 31 July 2008.

[22] In December 2008, Parklands consented to the vesting in the Papakura District Council of the panhandle land in Lot 1 covered by the extension of Hinau Road and surrendered its rights under the rights of way and services easements over the Karaka Lakes land covered by the road. Parklands retained remnant easements rights over the small section of Lot 1 that was not vested in the Council. Parklands consent to the surrender enabled Karaka Lakes to complete that stage of the Karaka Lakes development. Parklands did not seek any compensation from Karaka Lakes for agreeing to the surrender of the easements.

[23] In 2008, Karaka Lakes subdivided Lot 1 into two lots. The F & J Reynolds Family Trust acquired the northern lot at 65 Hinau Road containing Villa Rosa. Richard Reynolds, Francis brother, and Richard wife, Kirsty Reynolds, acquired the southern lot which, following the completion of a subdivision of adjoining land by another Reynolds-controlled company, Karaka Brookview Ltd, became 46 Ngakoro Road.

[24] In June 2009, Francis and Juliet Reynolds advised Mr Noma that Karaka Business Park was unable to settle the agreement for the purchase of the Parklands land and Mr Noma was unwilling to extend the settlement date further. As a consequence, Karaka Business Park forfeited its combined deposit of $2,500,000. While Karaka Business Park was the entity that forfeited the deposit, Juliet Reynolds

says that from that point, the relationship between the Reynolds on the one side and Parklands and Mr Noma on the other began to deteriorate.

[25] In 2015, Parklands made enquiries of New Zealand Bloodstock Ltd (NZ Bloodstock), which owns the land to the east of the easement land, to see whether NZ Bloodstock would be willing to sell some of its land to Parklands. NZ Bloodstock was unwilling to sell any of its land to Parklands.

[26] In February 2017, Parklands gave notice through its solicitors to the Reynolds that it had obtained consent to undertake bulk earthworks for the residential development of 72 Hinau Road earthworks and that contractors would be using the easement land for access purposes. It appears this letter was not received because it was incorrectly addressed. Juliet Reynolds says her family became aware of the works when Parklands pulled down the white gates the Reynolds had installed at the top of the driveway.

[27] In December 2017, the solicitors for Francis and Juliet Reynolds wrote to Parklands solicitors asserting that Parklands had breached the terms of the easements over the Parklands strip of the panhandle land by causing damage to the gates and fences of 65 Hinau Road. The letter sought to require Parklands not to undertake any further work until agreement had been reached with the Reynolds. The reply from Parklands' solicitors said the fences and gates were on Parklands land and that the Reynolds' access to their property and their right to use the right of way had not been compromised.

[28] In February 2018, Parklands' solicitors sent letters to the solicitors acting for the Reynolds interests requesting the Reynolds interests' consent to the surrender of the easements over Parklands' panhandle land so that the Parklands strip of the panhandle could be vested as a public road in accordance with the conditions of Parklands' resource consent for the development of 72 Hinau Road. The Reynolds interests were assured that access to their properties and use of services would not be compromised by the proposed vesting and surrender. Parklands did not offer any compensation for the surrender but undertook to meet the costs of preparing the necessary documents.

[29] The Reynolds interests did not reply to these letters.

[30] Relationships between the Reynolds interests and Parklands deteriorated further after contractors employed by Parklands cut down four of the plane trees that the Reynolds had planted along the driveway. Two of the trees were scheduled under the Auckland Unitary Plan as "notable trees".[3]

[31] In August 2018, there were meetings and correspondence between the Reynolds interests and the Auckland Council regarding the access arrangements for 72 Hinau Road and how they may affect the Reynolds interests. Juliet Reynolds says the Reynolds were unhappy that the application for resource consent for the Parklands subdivision had been considered on a non-notified basis. She also says a Parklands consultant engineer had informed the Council that he had discussed the proposed extension of Hinau Road with the Reynolds when there had been no such discussion. The Reynolds interests contemplated bringing judicial review proceedings against the Council but did not do so after the Council agreed to a realignment of the road to protect the remaining plane trees.

[32] In February 2019, Parklands' solicitors sent emails to the solicitors for the Reynolds interests seeking a response to the letters sent a year earlier. The solicitors for the Reynolds interests responded by seeking:

(a) Confirmation that Parklands would meet the Reynolds interests' costs incurred in relation to the requested surrenders;

(b) A set of consented plans showing that the Reynolds interests' access to their properties and their uses of services would not be compromised by the proposed vestings and surrenders;

(c) Advice on how long Parklands works would take; and

(d) Details of landscaping and tree planting.

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[3] On 31 October 2019, Parklands was granted retrospective consent to remove the two notable trees and two street trees.

[33] Parklands' solicitors provided information in response to these and subsequent requests, including confirmation that Parklands would pay up to $3,000 to Francis and Juliet Reynolds and to Richard and Kirsten Reynolds to meet their legal costs. Parklands' solicitors also provided assurances that Parklands would take all necessary steps to ensure the Reynolds interests' access rights would be maintained and conveyed an offer from Parklands to discuss an alternative method to carrying out the Parklands works if that was preferable to the Reynolds interests.

[34] By letter dated 27 September 2019, the solicitors for the Reynolds interests informed the solicitors for Parklands that the Reynolds interests did not consent to any of the proposed works which they considered would impede their rights of access, and the access rights of their invitees. The letter said the Reynolds interests wished to seek the protection of the Court and the doctrine of indefeasibility as regards their right of way easement. The letter said the reasons for seeking the Court protection included the illegal felling of protected plane trees and alleged misrepresentations made by a Parklands' consultant to the Auckland Council that he had consulted the Reynolds when he had not.

[35] Parklands filed its application to extinguish the easements on 29 January 2020.

Planning and regulatory history relevant to land of Parklands and Reynolds interests

[36] The 1999 Auckland Regional Growth Strategy identified the Hingaia Peninsula as future urban land to be developed in order to accommodate no fewer than 10,000 people by 2050. A structure plan was established for Hingaia and included in the Papakura District Plan by way of plan change. The structure plan envisaged the staged development of the peninsular. The structure plan classified Hinau Road as a future principal road which was intended to link Hinau Road in the north to Park Estate Road in the south. The envisaged extension of the road incorporated the panhandle land, passed through Lots 1 and 2 of the McCallum Block acquired by Karaka Lakes and Parklands in 2004, as well as land to the south of those lots.

[37] Juliet Reynolds says Karaka Lakes drove the plan change which became operative in 2005.

[38] In August 2007, Karaka Lakes applied for resource consent to subdivide the land to the west of the panhandle land. The application included a proposed extension of Hinau Road but only on the western side of the panhandle land. The application noted, however, that the six-metre wide carriageway that would be formed to accommodate the trees that had been planted by the Reynolds would be adequate for two-way traffic until the eastern side of Hinau Road had been constructed, at which point the full road would be wide enough to accommodate a footpath, cycleway, parking and a bus route.

[39] On 3 March 2008, the Papakura District Council granted resource consent to the Karaka Lakes subdivision on the basis that the easement strip owed by the Reynolds interests and over which Parklands had easements would become an extension of Hinau Road and would vest in the Papakura District Council. Various conditions of the consent noted that Hinau Road may be extended to full width if further development occurred.

[40] In September 2013, Parliament enacted the Housing Accords and Special Housing Areas Act 2013 (HASHA Act), the purpose of which was to enhance housing affordability by facilitating an increase in land and housing supply in identified regions and districts, including Auckland. An Order in Council made in December 2013 under the HASHA Act established the southern Hingaia Special Housing Area (Hingaia SHA). The Hingaia SHA included 72 Hinau Road as well as 65 Hinau Road and 46 Ngakoro Road.

[41] Following the establishment of the Hingaia SHA, Karaka Brookview applied for a variation to the proposed Auckland Unitary Plan. As a result of that application and further submissions, Hingaia Plan Variation 1 was adopted establishing the Hingaia 1 Precinct with an associated Precinct Plan.

[42] The Parklands land at 72 Hinau Road and the land owned by the Reynolds interests at 65 Hinau Road and 46 Ngakoro Road are part of the Hingaia 1 Precinct.

[43] The Hingaia 1 Precinct description states:

> The purpose of the Hingaia 1 precinct is to provide for comprehensive and integrated residential development on the Hingaia Peninsula, to increase the supply of housing (including affordable housing), to facilitate the efficient use of land, and to co-ordinate the provision of infrastructure.
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> It is envisaged that future land use, development and subdivision consents will give effect to the key elements of the precinct plan and provide opportunities for pedestrian and roading connections into future development areas.

[44] The Precinct Plan envisages a collector road running from Hingaia Road along the current extent of Hinau Road as well as the Parklands panhandle land, through Lots 1 and 2 acquired by Karaka Lakes and Parklands in 2004, and on southwards, across Park Estate Road to another yet to be formed collector road.

[45] The Auckland Unitary Plan, including the Precinct Plan, was made operative in part in November 2016. Under the Unitary Plan, the land in the Hingaia 1 Precinct is zoned "Mixed-Housing Suburban". Integrated residential development is a restricted discretionary activity in the Mixed-Housing Suburban Zone.

[46] On 10 August 2017, the Auckland Council granted resource consent to Parklands, on a non-notified basis, to subdivide the land at 72 Hinau Road. The consent authorised a vacant lot subdivision, to take place over three stages, for 158 residential lots, 19 future development residential super lots with associated roads and infrastructure. Conditions of the consent required Parklands, among other things, to:

(a) Construct a new public road incorporating the Parklands strip of the panhandle land and extending through the Parklands land to the southwestern corner of that land; and

(b) Vest the new road in the Auckland Council as a public road.

[47] Under the terms of the consent, Hinau Road would have two parallel four-metre wide carriageways, separated by a median strip up to the boundary with 65 Hinau Road. This would comprise the Parklands easement land and the existing Hinau Road established as part of the Karaka Lakes development. Beyond that point, the road would be six-metre wide dual carriageway.

[48] By the time of the hearing in June 2020, Parklands had undertaken the earthworks and most of the civil and engineering work necessary to allow titles to be issued for the lots created in Stage 1 of the proposed development. It has also undertaken earthworks for Stages 2 and 3. However, before any titles can be issued and the lots sold, the widening and extension of Hinau Road envisaged in the Parklands resource consent application must be completed and the easements surrendered so title to the road can vest in the Auckland Council.

Sections 316 and 317 of the Property Law Act 2007

[49] Section 316(1) of the PLA 2007 provides:

> (1) A person bound by an easement, a positive covenant, or a restrictive covenant (including a covenant expressed or implied in an easement) may make an application to a court for an order under section 317 modifying or extinguishing that easement or covenant.

[50] Section 317 of the PLA 2007 provides:

> (1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the **easement or covenant**) if satisfied that—
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> (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
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> (i) the nature or extent of the use being made of the benefited land, the burdened land, or both:
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> (ii) the character of the neighbourhood:
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> (iii) any other circumstance the court considers relevant; or
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> (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
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> (c) every person entitled who is of full age and capacity—
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> (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or

(ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or

(d) the proposed modification or extinguishment will not substantially injure any person entitled; or

(e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or

(f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.

(2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[51] The following definitions in s 4 of the PLA 2007 are relevant to the application of ss 316 and 317:

> **person bound** means, in relation to an easement, a positive covenant, a restrictive covenant, or a covenant in gross (as defined by section 307A) burdening land, an owner or occupier of the land against whom the easement or covenant is enforceable
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> **person entitled** means,—
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> (a) in relation to an easement, a positive covenant, or a restrictive covenant benefiting land, an owner or occupier of the land who is entitled to enforce the easement or covenant:
>
> (b) …

[52] There is no dispute that, in the present case, Parklands is a "person bound" by the easements over the panhandle land and the Reynolds interests are "persons entitled" to the benefits of those easements.

[53] Section 317 confers a discretion on the Court. As stated by the Court of Appeal in *New Zealand Industrial Park Ltd v Stonehill Trust Ltd*, it is for the owner of the burdened land to show that reasons exist for orders sought, that is, that one of the circumstances in paragraphs (a)-(f) applies, and that the orders are appropriate.[4]

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4 *New Zealand Industrial Park Ltd v Stonehill Trust Ltd* [2019] NZCA 147 at [72]-[75]. The Supreme Court has heard an appeal against the Court of Appeal's decision but at the time of writing this judgment, no decision had been issued.

[54] Paragraph (a) includes three sets of circumstances, any or all of which may provide a basis for the Court to exercise its discretion. Those circumstances address change since the creation of the easement, irrespective of whether that change was within the contemplation of the parties when the easement was created. By contrast, paragraph (b) addresses whether continuation of the easement in its existing form would impede the reasonable use of the burdened land differently from that which could reasonably have been foreseen at the time the easement was created.

[55] Whether or not compensation is required to be paid under s 317(2) if an order is made under s 317(1) is also at the discretion of the Court.

Positions of the parties

[56] Mr Savage, counsel for Parklands, submitted that the circumstances in paragraphs (a)(i)-(iii), (b) and (d) of s 317(1) apply and satisfy the jurisdictional prerequisites for the exercise of the Court discretion, and that the Court should exercise its discretion and extinguish the easements. Mr Savage also submitted that the Court should not order the payment of any compensation to the Reynolds interests because of the absence of any detriment to them.

[57] Mr Salmon, counsel for the Reynolds interests, submitted that none of the circumstances in s 317(1) applies and that the Court has no basis to order the extinguishment of the easements. Mr Salmon further submitted that even if the Court should find that one or more of the jurisdictional prerequisites in s 317(1) are met, the Court should not exercise its discretion to extinguish the easements. Mr Salmon also submitted that if the Court should exercise its discretion to extinguish the easements, it should order Parklands to pay the Reynolds interests compensation of $7,700,400.

Questions for determination

[58] The questions for determination are:

(a) Do any of the circumstances in s 317(1)(a), (b) and (d) apply?

(b) If so, should the Court extinguish the easements?

(c) If the easements are extinguished, should Parklands be required to pay compensation to the Reynolds interests?

(d) If compensation is payable, what amount of compensation is reasonable?

[59] Before considering those questions, it is relevant to consider the nature of the easements because that may bear on whether the easements "ought" to be extinguished if any of the circumstances in s 317(1) apply.

The nature of the easements

[60] The original right of way easement granted in August 1999 was for vehicular right of way. The transfer establishing the easement set out ss 126 and 126A-126G and the Ninth Schedule of the Property Law Act 1952 (PLA 1952) which were to apply in substitution for the rights in the Seventh Schedule to the Land Transfer Act 1952.[5] Among the specifically included provisions was s 126G of the PLA 1952, a predecessor of s 317 of the PLA 2007, conferring on the Court the power to modify or extinguish an easement in the circumstances provided.

[61] The Ninth Schedule of the PLA 1952 stated that the rights conferred under the easement included the right to establish a driveway and to repair and maintain the driveway, the right to have the easement land kept clear of obstructions, the right to a reasonable contribution from other occupiers for the costs of maintenance and repair, and the right to recover the costs of maintenance and repair from other users whose wilful or negligent acts caused damage to the easement.

[62] In addition, the transfer stated that the cost of forming and maintaining the right of way in a good state of repair "giving all weather vehicular and pedestrian access to those entitled to use the right of way" was to be borne by all registered proprietors of the lots affected by the easement.

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5 The Ninth Schedule of the PLA 1952 is similar in content to Schedule 5 of the PLA 2007 except that the heading in Schedule 5 makes it clear that the rights set out in the Schedule are covenants implied in grants of vehicular rights of way.

[63] The right of way and services easements granted in 2007 by Parklands to Karaka Lakes (and by Karaka Lakes to Parklands) were in standard form and incorporated the rights and powers implied for those classes of easement in the Land Transfer Regulations 2002 and the Ninth Schedule of the PLA 1952, subject to some minor variations that are not relevant to the questions before the Court.

[64] I do not accept the submission of Mr Salmon that the easements conferred rights on the Reynolds interests that are almost as good as fee simple. The rights conferred by the original easement and by the 2007 easements were specific and limited to the use of the easement for access and services. As stated in *Hinde, McMorland & Sim: Land Law in New Zealand*:[6]

> Because an easement is essentially a right to do an act on land in the occupation of someone else, the easement itself cannot be such that occupation is shared or passed to the benefited owner. … An easement is therefore clearly distinguishable from a lease which exists only if the occupier has exclusive possession of the premises. Whether occupation is shared with, or has passed to the benefited owner is necessarily a matter of degree and the Court must look at each case on its own facts.

[65] The facts of this case are that the original easement conferred on the owners of what became 65 Hinau Road and 46 Ngakoro Road rights to form, maintain and use a driveway. That right was not exclusive and had to be shared with other users entitled to use the land to which the easement applied. That necessarily included Parklands, the owner of the land. Whether the right to form, maintain and use a driveway included the right to plant trees on someone else land and to put gates at each end of the driveway is at least an open question.

[66] No greater rights were conferred under the right of way easement granted in 2007. Additional specific rights to use the easement land to convey services were conferred by the access easements.

[67] As already noted, no services are conveyed to 65 Hinau Road or 46 Ngakoro Road via the easement land. The only current use of the easement land by the Reynolds interests is as a driveway to 65 Hinau Road.

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6 D W McMorland and others, *Hinde McMorland & Sim: Land Law in New Zealand* (online ed, Lexis Nexis) at [16.006(c)] (citations omitted).

Do any of the circumstances in s 317(1)(a), (b) or (d) apply?

s 317(1)(a)(i): Has there been change in the nature or extent of the use of the benefited or burdened land since the creation of the easements?

[68] Mr Savage submitted that the requirements of s 317(1)(a)(i) are met having regard to the partition agreement of 12 May 2004 and the references in the agreement to the development of their respective landholdings, the establishment of the Hingaia SHA, the Reynolds interests' promotion of the Hingaia 1 Variation to the Auckland Unitary Plan and the incorporation of the Hingaia Precinct Plan in the Auckland Unitary Plan, the reference to the future extension of Hinau Road in Karaka Lakes' application for subdivision consent and the conditions imposed by the Papakura District Council when granting that consent, the resource consents granted to Parklands enabling subdivision of its land and requiring the vesting of the extension to Hinau Road in the Auckland Council, and the extensive works undertaken by Parklands in exercising those consents.

[69] Mr Salmon submitted that most of the considerations pointed to by Mr Savage are not relevant to s 317(1)(a)(i) because they do not relate to actual change in the nature or extent of the use of the benefited or burdened land. Mr Salmon submitted that there has been no change in the use of the benefited land (65 Hinau Road and 46 Ngakoro Road) since the creation of the easements and that the only change to the burdened land (72 Hinau Road) is the earthworks and other works associated which Stage 1 of the Parklands development but said that these do not amount to a change of use.

[70] As stated in *Hinde, McMorland & Sim*, in a passage referred to by the Court of Appeal in *Stonehill* and by both Mr Savage and Mr Salmon:[7]

> The inquiry as regards this ground is "whether, by reason of any change of the kind mentioned the [easement or] covenant should be modified or extinguished. The focus is not on the fact of the change, but rather on its impact from the point of view or making it appropriate to modify [or extinguish] the [easement or] covenant." It is not sufficient that changes have occurred in the use of the properties affected by the easement or covenant such that the applicant would be advantaged by the order sought. The change is most likely to be relevant if it has altered the benefit or disadvantage resulting

[7] Above n 6, at [17.039] (citations omitted).

> from the continuance of an easement or covenant. Though it should not be regarded as a prerequisite to making an order, the most common justification for doing so would be evidence that the relative advantages and disadvantages flowing from the easement or covenant have become totally disproportionate by reason of changes that have occurred since its creation. The basic concern is the effect of the easement or covenant if it were not to be modified or extinguished; not the effect of the order sought. A change in the use of the burdened land subject to an easement or covenant in breach of the rights of the benefited owner will not found a successful application by the burdened owner responsible for the breach.
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> The change of user may relate to either the benefited or the burdened land.
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> The change of user must have occurred between the time the easement or covenant was created and the time when the application comes before the court. Future user is not relevant, but the change which has occurred may be measured against the user contemplated when the right was granted.

[71] It is clear from s 317 itself and from the above passage that the change must be actual change of the use "being made" of the land itself. Future change, whether contemplated under an agreement between land owners, legislation, planning documents, in an application for resource consent or in the conditions of a resource consent, does not of itself establish a basis for extinguishing an easement under s 317(1)(a)(i).

[72] As Mr Salmon said, there has been no change in the use of the 65 Hinau Road containing Villa Rosa, which continues to be used for residential purposes. There has been no significant change to the use of 46 Ngakoro Road. While some earthworks have been undertaken on that land, that change is not affected by the existence or otherwise of the easement because no use is made of the easements with respect to 46 Ngakoro Road.

[73] I do not agree, however, that there has been no change in the use of the Parklands land. At the time the easements were put in place, the land was bare land used for farming purposes. Now, the land is under development and has been heavily modified by the earthworks and Stage One works carried out on behalf of Parklands. Those works have been carried out in accordance with resource consents granted by the Auckland Council under the Auckland Unitary Plan and in accordance with the development envisaged in the Hingaia Precinct Plan.

[74] The works undertaken by Parklands are not in breach of the easements or in any other way inconsistent with the Reynolds interests' use of their land. In that respect, the situation is quite different from that considered by the Court of Appeal in *Stonehill*, where the applicant had obtained resource consent to build, and had started building, a dairy factory on land that was subject to restrictive covenants which:

(a) Required that the land on which the dairy factory was to be constructed to be used only for the purposes of grazing, lifestyle farming and/or forestry; and

(b) Required the occupiers of that land to allow quarrying to take place on the adjacent land and not to object to the adverse effects of quarrying activities.

[75] It was because the construction of the dairy factory was in breach of the first of those covenants that the Court of Appeal said that a change of use by an applicant acting in breach of a covenant cannot be used as leverage to obtain modification of extinguishment of a covenant.[8]

[76] I am satisfied, therefore, that there has been lawful change in the nature and the extent of the use of the burdened land. I am also satisfied that the change has altered the disadvantage resulting from the continuance of the easements. The obvious disadvantage is that the change of use, while authorised by the planning instruments and resource consents, cannot be implemented fully unless the easements are extinguished and the land subject to the easements vested in the Auckland City Council as required by the conditions of the resource consents. While Parklands would be advantaged by the extinguishment because it sought the resource consents and is undertaking the development, the fact it would be advantaged does not mean the requirements of s 317(1)(a)(i) cannot be satisfied.

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8 Above n 4, at [86].

s 317(1)(a)(ii): Has there been change in the character of the neighbourhood since the creation of the easements?

[77] Mr Savage submitted that the character of the neighbourhood had changed in many respects since the easements were created and referred in particular to the Karaka Lakes subdivision and subsequent development.

[78] Mr Salmon submitted that while residential development in the area has continued to grow, it could not be said that the character of the neighbourhood has changed beyond that which could have been reasonably contemplated when the easement was created. He also submitted that, even if the character of the neighbourhood has changed, the change has not increased the burden of the driveway easement which is, and has always been, to provide access to 65 Hinau Road.

[79] As the Court of Appeal stated in *Stonehill*:[9]

> [96] The meaning of the word "neighbourhood" will vary with the circumstances of each case, as will what constitutes a change in its character. The servient land can be part of the neighbourhood. The neighbourhood can extend, not only to any land entitled to the benefit of the covenant, but also to other land within a reasonable radius of the servient land. Increased development, particularly if it increases the burden imposed by the covenant on the servient land, could be a sufficient change in the character of the neighbourhood to get over the statutory threshold, but it may not be enough to show that the neighbourhood is in transition, if it cannot also be shown that such transition would not have been contemplated by the parties when the covenant was entered into.
>
> (citations omitted)

[80] Mr Salmon submissions referenced the above passage, particularly the last sentence which refers to the need to establish change not within the contemplation of the parties in order to satisfy the requirements of s 317(1)(a)(ii).

[81] While the last sentence in [96] of *Stonehill* states that it may be necessary to show change beyond that contemplated at the time an easement or covenant was created in order to get over the statutory threshold, it does not establish a requirement that to found a basis for extinguishment or modification of an easement or covenant, any change in the character of the neighbourhood must be a change that would not

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9 Above n 4.

have been contemplated by the parties when the easement or covenant was created. There is no basis for such a requirement in s 317(1)(a) or its predecessor sections or in *Richardson v Manawatu Tyre Rebuilders Ltd,* the decision of the then Supreme Court which the Court of Appeal cited in support of that sentence.[10]

[82] In *Richardson*, Turner J considered an application to modify a right of way easement that granted "full and exclusive right and liberty" to the owners and successors in title (and their invitees) of land to use a 12 foot wide strip of land along two sides of an adjacent property "for all purposes whatsoever connected with the use and enjoyment" of their land … "whilst the building now erected on the said land shall be used as a dwellinghouse".[11] The applicant sought the deletion of the dwellinghouse limitation so the easement would still be available to the owners of the benefited land if the land was used for business purposes.[12]

[83] The question before the Court, in terms of s 127 of the Property Law Act 1952, was whether, by change in the character of the neighbourhood, the dwellinghouse restriction "ought to be deemed obsolete".[13]

[84] It was in that context that Turner J said:[14]

> There is some proof of a change in the character of the neighbourhood which is shown to be in a state of transition from a residential to a business quarter. I do not think, however, that such a degree of change as is proved would justify me in concluding that by reason of it the restriction should be deemed obsolete. Indeed, the parties to the original grant seem to me to have envisaged, more or less clearly, that the day might come when the character of the neighbourhood might change exactly as has been the case, and that the premises might cease to be used as a dwellinghouse; and in that case they have expressly provided that the reserved user is to cease.

[85] In other words, what the parties would have envisaged at the time of creation of the easement was relevant in deciding whether the change of character in the neighbourhood made the dwellinghouse limitation obsolete.

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10 *Richardson v Manawatu Tyre Rebuilders Ltd* [1955] NZLR 541 (SC).
11 At 541-542.
12 At 542.
13 At 543.
14 At 543.

[86] Similarly, in *Stonehill* the Court of Appeal noted that the covenants had been entered into relatively recently – 1998 and 2000 – and that some change in the character of the neighbourhood must have been contemplated at that time.[15] Even so, the parties concerned had entered into covenants of 200 years' duration that specifically prohibited the land being used except for a limited number of purposes. In that context, the Court held that subsequent change in the character of the neighbourhood was not sufficient for the Court to conclude that the covenants "ought" to be modified or extinguished.[16]

[87] The situation in the present case is again quite different. At the time the right of way easement was created, it would have been in the contemplation of the McCallums that the land later purchased by Parklands and the Reynolds interests would eventually be developed as Auckland expanded. The original easement was put in place in 1999, the same year the Auckland Regional Growth Strategy envisaged the development of the Hingaia Peninsula as future urban land to accommodate 10,000 people by 2050. It is reasonable to infer that purpose of the original subdivision creating the McCallum Block land was to ensure that the land serviced by the easements would be available for future development.

[88] The creators of the original easement could not know then how and when that development would proceed. But, as a minimum, they had to ensure that the land was accessible. That is what the original easement ensured. But the creators of the easement would have known that there might need to be changes to the easement arrangements as the development of the land proceeded, as is suggested by the specific inclusion of the predecessor section of s 317 in the instrument creating the easement.

[89] I reach the same conclusion about the 2007 easements which were agreed by Parklands and Karaka Lakes after they had concluded the partition agreement which specifically envisaged the two parties co-ordinating separate developments, including the extension of services and roading to the expected boundary between their two properties.

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15 Above n 4, at [99].
16 Above n 4, at [100].

[90] In other words, the easements were facilitative and were not intended either to limit the future development of the land, as was the purpose of the covenant in *Stonehill*, or to limit the easement only to the use of the benefited land at the time the easement was created, as was the purpose of the easement in *Richardson*. In the circumstances of this case, I am satisfied that change that was in the contemplation of the parties at the time the easements were created can be taken into account when considering whether the easements ought to be extinguished.

[91] There has undoubtedly been significant change in the character of the neighbourhood since the original easements were created in 1999. Most significantly, the Karaka Lakes and Karaka Brookview developments have taken place and are taking place immediately to the west of the easement land, to the north and west of 65 Hinau Road and 46 Ngakoro Road and to the south of 46 Ngakoro Road. As a consequence, significant development has occurred or is in the process of occurring on three of the four boundaries of the Reynolds interests' land which claims the benefit of the easements. The Reynolds interests themselves have had a direct involvement in those developments, albeit through companies they have established.

[92] An important component of that change was the extension of Hinau Road to the boundary of 65 Hinau Road as part of the Karaka Lakes development. As a result of that extension, Francis and Juliet Reynolds and their family could have accessed their property directly from that public road. For their own reasons, they have preferred to keep using the driveway over Parklands' land in exercise of their rights under the right of way easements.

[93] The development of the public road may not have altered the benefit of the easements to the Reynolds interests' land. It has, however, had the consequence of increasing the burden of the easement to Parklands' land because Parklands is constrained in the use of its land by easements which are not being used (the services easements) or which are unnecessary because there is now an entirely serviceable alternative immediately adjacent to the easement land (the right of way easements).

[94] For these reasons, I am satisfied that the requirements of s 317(1)(a)(ii) are met.

s 317(1)(a)(iii): Are there other relevant circumstances since the creation of the easements that the Court should take into account?

[95] Neither counsel addressed this sub-paragraph in detail. Both noted the catch-all nature of the provision. Mr Savage submitted that the considerations he had identified with respect to the other subparagraphs are also relevant here.

[96] As stated in *Hinde, McMorland & Sim*, s 317(1)(iii):[17]

> … is a general provision that allows the Court to consider any other circumstances it considers relevant. Foreshadowed changes to the character of the neighbourhood which are almost certain to come about may be argued under this head. Such a foreshadowed change may come about through a change in zoning of land affected by the covenant.

[97] The Court of Appeal in *Stonehill* similarly recalled the wide reach of s 317(1)(a)(iii) and agreed that "foreshadowed changes that are almost certain to come about may be raised under this head."[18]

[98] In *Stonehill*, the Court did not consider that the utility of the restrictive covenants was compromised by the rezoning of the burdened land. Whatever the zoning, development of the burdened land was prevented by the restrictive covenants which had more than 170 years to run.[19] In that sense, the development of the burdened land was not certain to come about, whatever change in zoning might take place.

[99] The present situation is not analogous. Here, both the burdened land and the benefited land are zoned for development under the operative Auckland Unitary Plan which incorporates the Hingaia 1 Precinct and its Precinct Plan. While development is still contingent on the decisions of individual landowners, and resolution of any related legal issues, the intended shape of development, including the inclusion of the Parklands panhandle land in an extension of Hinau Road has been clear for over 15 years. That is reflected in the partition agreement, the terms of the Karaka Lakes resource consent application, the inclusion of the Hingaia 1 Precinct Plan in the Auckland Unitary Plan, and the establishment of the Hingaia SHA.

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17 Above n 6, at [17.039].
18 Above n 4, at [101].
19 Above n 4, at [103].

[100] Similar considerations, namely the establishment of a SHA under the HASHA Act, the change of zoning under the Hingaia Precinct Plan and the Auckland Unitary Plan and the obtaining of a qualifying resource consent, were considered sufficient in *Re Barfilon Investment Ltd* for the High Court to conclude that a restrictive covenant should be modified.[20]

[101] Mr Salmon and Mr Baikie, the planning expert who gave evidence for the Reynolds interests, made much of the possibility that Hinau Road may never be extended south of the properties owned by the Reynolds interests and Parklands because of the difficulty of securing the agreement of relevant landowners whose properties border Park Estate Roads. Whether or not that assessment is correct, that does not negate the fact that Parklands has been required to extend the road through its land as a condition of its resource consents and the first part of that extension over the easement land is in accordance with the Hingaia 1 Precinct Plan.

[102] To satisfy the Auckland Council condition, Parklands must secure the surrender or extinguishment of the easements over the panhandle land. In that sense, the easements are a fetter on development in circumstances where the Council chooses not to exercise its powers of designation under the Resource Management Act 1991 and compulsory acquisition under the Public Works Act 1981. However, whether or not the Council exercises those powers, for the reasons discussed above I am satisfied that the purpose of the easements was not to fetter development but to allow it to happen.

[103] For these reasons, I am satisfied that there are circumstances that have occurred since the easements were created, namely the establishment of the Hingaia SHA, the development of the Hingaia Precinct Plan and its incorporation into the Auckland Unitary Plan, and the making of those parts of the Auckland Unitary Plan operative, and the granting of resource consents to Parklands in accordance with the developments promoted in those instruments that should properly be taken into account under s 317(1)(a)(iii).

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[20] *Re Barfilon Investment Ltd* [2019] NZHC 780 at [33]. See also *North Holdings Development Ltd v WGB Investments Ltd* [2014] NZHC 670 at [30] and *Re Aklander Investment Ltd* [2017] NZHC 2939 at [3].

[104] Because I have found that the circumstances of s 317(1)(a)(i)-(iii) each apply, it is not necessary also to consider whether the circumstances of paragraphs (b) and (d) also apply. However, because counsel addressed these in some detail, I also consider those paragraphs.

s 317(1)(b): Would continuation of the easements impede the reasonable use of Parklands land in a different way or to a different extent from that which what could reasonably have been foreseen when the easements were created?

[105] This point can be dealt with briefly. For the reasons stated above, I consider the easements were intended to have been facilitative – to enable rather than to prevent development. At the same time, it would have been apparent to the creators of the original easement in 1999 and to Parklands and Karaka Lakes in 2007 that if the original easements were not modified or extinguished, they could constrain the development of the land over which they were created. The partition agreement referred specifically to the possibility of a road being required to be formed over the easement land. They would have known that, in that case, it would be likely that the land would be vested in the Council and the easements would have to be surrendered or extinguished. That conclusion is reinforced but the fact that the easement land was excluded from the valuation exercise carried out for the purposes of the partition.

[106] For these reasons, I accept Mr Salmon submission that continuation of the easements would not impede the reasonable use of Parklands' land beyond that which could reasonably have been foreseen at the time the easements were created. I am satisfied, therefore, that s 317(1)(b) is not applicable.

s 317(1)(d): Would extinguishment of the easements substantially injure the Reynolds interests?

[107] Mr Savage submitted that extinguishment of the easements would have no significant effect on the Reynolds interests. The Reynolds interests do not use or need the service easements and will, in any event, have full access to the services to be provided in the extension of Hinau Road. Richard and Kirsten Reynolds access 46 Ngakoro Road from Ngakoro Road and do not use the right of way easements in relation to that property. Francis and Juliet Reynolds will have full rights of access directly to 65 Hinau Road from the extended and widened Hinau Road. For these

reasons, Mr Savage also submitted that not only would extinguishment of the easements not injure the Reynolds interests, it would also confer a benefit on them because of the improved services and access that would result.

[108] Mr Salmon submitted that extinguishment of the easements would substantially injure the Reynolds interests in two ways. First, it would replace the peaceful and private driveway to 65 Hinau Road with a collector road likely to carry hundreds of vehicle-trips a day, which would change the peace and quiet Francis and Juliet Reynolds, in particular, currently enjoy. Secondly, development of the Parklands land would have adverse economic consequences for the Reynolds interests because it would increase the supply of residential housing in the area and thereby reduce the potential value that could be achieved by the development of the Reynolds interests' land. In other words, the Reynolds interests would lose first-mover advantage if Parklands were able to develop its land before the Reynolds interests developed their land.

[109] Mr Salmon did not assert that extinguishment of the easements would substantially affect the Reynolds interests' access to their properties.

[110] As noted by the Court of Appeal in *Stonehill*, and in *Hinde, McMorland and Sim*, this ground has been described as a "long stop against vexatious objections to extended user" and "designed to cover the case of the proprietorially speaking, frivolous objection."[21]

[111] When considering this paragraph, the Courts have regard to whether a proposed modification or extinguishment of an easement or covenant would have a real, considerable or significant effect on the enjoyment of the benefit that the easement or covenant were intended to secure. Thus, in *Plato v Ashton*, the Court of Appeal considered whether the extinguishment of a right of way easement would substantially affect the enjoyment of access rights to a house which had alternative access from an adjacent street.[22] In *Waikauri Bay Reserve v Jamieson*, the High Court considered whether modification of a right of way easement would cause injury in

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21 *Stonehill,* above n 4, at [112] and *Hinde, McMorland & Sim,* above n 6, at [17.042].
22 *Plato v Ashton* (1984) 2 NZCPR 191 (CA) at 194, per McMullin J for the Court.

circumstances where existing practical rights of access would remain undiminished.[23] In *Jansen v Mansor*, the Court of Appeal considered whether modification of a restrictive covenant limiting the height and dimensions of a building on the burdened land would have a significant effect on the view from the benefited land which the covenant was intended to preserve.[24] In *Pollard v Williams*, the High Court considered whether removal or modification of a covenant requiring those bound by the covenant not to use pre-used or second hand materials on the exterior of any building would cause injury when the purpose of that and other covenants was to preserve visual appearance.[25]

[112] Similarly, in *Re Barfilon,* the High Court considered whether modification of a restrictive covenant which precluded small or low-cost dwellings would substantially injure the benefits the covenant was intended to secure, namely the enjoyment of a high standard of rural residential amenities.[26] In that case, Gault J considered that impairment of views and alteration to the character or ambience of the neighbourhood might well amount to substantial injury.[27] However, that was in the context of a covenant intended to secure those amenities.

[113] I have found no case where the Court has held that an injury that is collateral to the benefit an easement or covenant was intended to secure can provide a basis for asserting substantial injury for the purposes of s 317(1)(d).

[114] Neither of the injuries asserted by the Reynolds interests relates to the benefits which the easements were intended to secure. The right of way easements were for vehicular right of way and included the right to form, maintain and use a driveway. As discussed above, the right conferred was to a driveway, not to a private driveway. The fact the Reynolds chose to plant trees on Parklands land and put gates at each end of the easement does not entitle them to the maintenance of the ambiance that resulted from those actions.

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23 *Waikauri Bay Reserve v Jamieson* HC Auckland, CP 1981/87, 12 February 1990.
24 *Jansen v Mansor* (1995) 3 NZ ConvC 192,111 (CA) at 192,115-192,116 per McKay J for the Court.
25 *Pollard v Williams* [2019] NZHC 2029, (2019) 20 NZCPR 371.
26 Above n 20.
27 At [43].

[115] In addition, beyond assertion, there is no evidence before the Court of the adverse effects of the collector road, if formed, on the ambiance of the homestead at 65 Hinau Road which is set back some 248 metres from the boundary of their property where the road would be located. Juliet Reynolds' evidence focused on the impact that extension of Hinau Road would have on the tree-lined boulevard she has created and not on the impact that extension of the road would have on 65 Hinau Road itself.

[116] As to the economic consequences of the Reynolds interests losing 'first-mover' advantage over Parklands, I am reluctant to accept that consequences unrelated to the benefits the easements were intended to secure should found a basis for holding that extinguishment of the easements would substantially injure the Reynolds interests. To do so would encourage the "vexatious objections to extended user" that s 317(1)(d) is intended to guard against.

[117] However, it is for Parklands to prove that the circumstances of s 317(1)(d) apply and not for the Reynolds interests to prove the section does not apply. Apart from asserting that extinguishment of the easements would cause no substantial injury to the Reynolds interests and would, in fact, provide them with a benefit, Parklands did not address, in its evidence or submissions, the adverse consequences of extinguishment asserted by the Reynolds interests. For this reason, I consider that Parklands has not established that the circumstances of s 317(1)(d) apply.

Conclusion on whether any of the circumstances in s 317(1)(a), (b) or (d) apply

[118] For the reasons given, I am satisfied that the circumstances in s 317(1)(a)(1), (ii) and (iii) apply. I do not consider that s 317(1)(b) applies and Parklands has not satisfied me that s 317(1)(d) applies.

Should the Court exercise its discretion to extinguish the easements?

[119] In *Stonehill*, the Court of Appeal restated what has been said in a number of earlier decisions, namely that courts have traditionally taken a conservative approach towards the exercise of the discretion conferred by s 317 because applications to modify or extinguish an easement generally impact adversely on existing property

interests.[28] Justice Wylie for the Court acknowledged that there had been a progressive broadening of the power conferred by predecessor sections and a commensurate relaxation of the approach the Courts have adopted, but said the section could not be used to free a person bound from an easement or covenant simply to improve that person enjoyment of their property for private reasons. Justice Wylie also recalled the reluctance of Courts generally to allow contractual property rights to be swept aside in the absence of strong reasons.[29]

[120] Mr Savage submitted that the Court should exercise its discretion because the requirements of s 317(1)(a) have been met and Parklands needs the easements extinguished in order to comply with the conditions of its resource consents and complete its development.

[121] Mr Salmon submitted that the Court should refuse to exercise its discretion because:

(a) The easements confer property rights with which the Court should be slow to interfere;

(b) Parklands has failed to identify strong reasons for extinguishment other than the wish to press ahead with the development of 72 Hinau Road; and

(c) Parklands has behaved tactically and imprudently in proceeding with the development without securing access to the development by obtaining the surrender of the easements, has not offered to purchase the extinguishment of the easements, and has offered no compensation other than a modest contribution towards the Reynolds interests' legal costs.

[122] While the easements are property rights, they are rights conferred for particular purposes. They may provide collateral benefits and negotiating advantage that extends

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28 Above n 4, at [73] citing *Okey v Kingsbeer* [2017] NZCA 625, (2017) NZCPR 25 at [52].
29 Above n 4, at [73].

beyond those purposes as already discussed. However, in considering whether to exercise the discretion to extinguish, the purposes of the easements and the extent those purposes can be achieved must be a primary consideration.

[123] In this case, no use is made of the services easements at present and any future need for services by the benefited properties will be met by the extension of Hinau Road. The same applies to the right of way easements with regard to 46 Ngakoro Road. While 65 Hinau Road will lose the privacy and ambiance of the narrow tree-lined driveway, it will also have services and access from the extension of Hinau Road. In other words, there will be no loss to the benefited properties of any of the essential benefits secured by the easements. Those considerations weigh in favour of exercising the discretion.

[124] In addition, extinguishment of the easements in order to enable the vesting of the extension of Hinau Road in the Auckland Council is consistent with the expectations of Parklands and Karaka Lakes, a company controlled by some of the Reynolds interests, when Parklands and Karaka Lakes purchased the burdened and benefited properties, and with the expectations of Karaka Lakes as reflected in its application for resource consent for the Karaka Lakes development and in the terms of the consent. It is also consistent with the Hingaia Precinct Plan, which the Reynolds interests themselves promoted. It will also enable completion of the Parklands development, consistently with policy of the Hingaia SHA and the policy and provisions of the Auckland Unitary Plan. These considerations weigh strongly in favour of exercising the discretion.

[125] It may have been prudent and appropriate for Parklands to have made a greater effort to negotiate with the Reynolds interests to secure the surrender of the consents, and in that context to have offered them compensation in excess of a contribution to their legal fees before commencing their development of 72 Hinau Road. However, prior negotiations are not a precondition for an application under ss 316 and 317 of the PLA 2007 or for the exercise of the Court discretion. In addition, as Juliet Reynolds herself acknowledged, relations between the Reynolds interests and Parklands have been difficult since Karaka Business Park forfeited its deposit of $2,500,000 when it was unable to complete the purchase of the Parklands land.

Furthermore, it is apparent from the correspondence between the parties' solicitors in 2019 that relations between the parties have remained difficult. In these circumstances, it is understandable that Parklands did not make a greater effort to negotiate with the Reynolds interests. For these reasons, I do not accept that the behaviour of Parklands or, for that matter, the behaviour of the Reynolds interests, should weigh in the balance when considering whether to extinguish the easements.

[126] I am satisfied, therefore, that there are strong reasons for exercising the discretion to extinguish the easements in this case, even taking into account the conservative approach reaffirmed by the Court of Appeal in *Stonehill*.

Should Parklands be required to pay compensation to the Reynolds interests?

[127] Mr Savage submitted that no compensation should be ordered and did not address what compensation should be paid if that submission were not accepted.

[128] Mr Stevenson, a valuer who gave evidence for Parklands, said no compensation should be paid because extinguishment of the easements would have no negative effect on the value of 65 Hinau Road or 46 Ngakoro Road. He noted that no use is made of the existing services easements and that the only current use of the right of way easements was as a driveway to 65 Hinau Road. He also noted that both properties would have secure access and services directly from the extended Hinau Road. Mr Stevenson considered this to be a net benefit to those properties.

[129] In reaching his conclusion that extinguishment of the easements would have no negative effect on the value of 65 Hinau Road or 46 Ngakoro Road, Mr Stevenson valued both properties as development land because that is the highest and best use of that land. He also took into account the Hingaia Precinct Plan and the Mixed Housing Suburban zone that applies to those properties and to 72 Hinau Road. In that context, Mr Stevenson took no account of the loss of the driveway to 65 Hinau Road, probably because Villa Rosa would no longer be present under a scenario where 65 Hinau Road was developed to its full potential.

[130] Mr Stevenson also excluded from consideration any competitive advantage that the Reynolds interests might have over Parklands if they were able to delay the Parklands development by refusing to surrender the easements.

[131] The approach advocated by Mr Salmon and Mr Dunlop, the valuer who gave evidence for the Reynolds interests, was starkly different. Based on the approach set out by the Court of Appeal in *Jacobsen Holdings Ltd v Drexel*,[30] and the analysis of Mallon J in *Dooley v Sturgess Consulting Ltd*,[31] Mr Salmon submitted that the Reynolds interests are entitled to compensation of $7,700,400. That sum comprises two elements as follows:

(a) $3,060,000, which Mr Dunlop calculated was the loss in value to 65 Hinau Road ($1,820,000) and 46 Ngakoro Road ($1,240,000) resulting from the development of 72 Hinau Road following extinguishment of the easements; and

(b) $4,640,400 being 36 per cent of the value that Mr Dunlop calculated was the benefit to Parklands resulting from the extinguishment of the easements.[32]

[132] Compensation is at the discretion of the Court and is not automatic. That is clear from the language of s 317(2): "An order under this section … extinguishing the easement … may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court." However, as Wylie J observed in *Cambray v Minister of Land Information*, while s 317(2) confers a discretion on the Court to award compensation, it is conspicuously silent on how compensation is to be assessed.[33]

[133] The decision of the Court of Appeal in *Drexel* is the leading authority on how compensation is to be assessed. Whether compensation should be assessed was

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30 *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (CA).
31 *Dooley v Sturgess Consulting Ltd* [2016] NZHC 1905, (2016) 18 NZCPR 400.
32 Mr Dunlop's actual figure was $5,011,920, being 36 per cent of $13,922,000 as set out in Mr Dunlop's Compensation Calculation. I have adjusted those figures as discussed in fn 2.
33 *Cambray v Minister of Land Information* (2011) 12 NZCPR 721 (HC) at [15].

addressed inferentially by Mallon J in *Dooley* in her summary of the approach to compensation after reviewing the judgments in *Drexel*. Justice Mallon stated:[34]

> [20] Accordingly, the approach to compensation is:
>
> (a) Compensation need not always be ordered (it is discretionary).
>
> (b) However, it will ordinarily be fair to order compensation, because the defendant (the provider of access) is required by the Court to provide something of value to the plaintiff (the owner of the landlocked land) and potentially to the detriment of the defendant.
>
> (c) The amount of compensation is the fair consideration which a willing buyer and a willing seller would agree to in a friendly negotiation.
>
> (d) In ordering compensation it is relevant to consider both the benefits and detriments to either side in providing the access because they are factors a willing seller and a willing buyer would take into account.
>
> (e) But the amount ordered must be "reasonable" in the circumstances and not an amount which is forced to "unreasonable heights by necessity."

[134] Adopting that analysis, the question to be considered is whether, in extinguishing the easements, the Court is asking the Reynolds interests to provide something of value to Parklands?

[135] Mr Savage and Mr Stevenson did not address this question directly in their submissions and evidence. They focused exclusively on whether extinguishment would be to the detriment to the Reynolds interests. However, the Court of Appeal in *Drexel* specifically rejected that approach, holding in that case that the High Court had been wrong to award compensation solely on the basis of the loss to the party being required to provide an easement over its land.[35] President Cooke agreed that the measure of compensation can, in general, be described as the loss to the person from whom property is taken. However, he then stated:[36]

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34 Above n 31, at [20] (citations omitted).
35 Above n 30, at 329.
36 At 328.

> What the owner loses by a compulsory order, whether for taking of the fee simple or only an easement, includes potential; which carries with it the power to bargain with any would-be purchaser

[136] It is plain that if the Court extinguishes the easements it will be directing the Reynolds interests to give up their power to bargain with Parklands. While, as I have found, there will be no loss of access or services to the Reynolds interests' land if the easements are extinguished, in order to comply with the terms of its resource consent and, more importantly, in order to be able to offer the subdivided lots for sale, Parklands needs the Reynolds interests to agree to the surrender of the easements. That gives the Reynolds interests the power to bargain, which is of value. I am satisfied, therefore, that, in principle, it would be appropriate to award compensation.

What amount of compensation is reasonable?

[137] In *Dooley*, Mallon J analysed decisions of the Court of Appeal since *Drexel* where compensation had been awarded, in particular *Lowe v Brankin*,[37] *Hajnal v Asmussen*,[38] and *MacRae v Walshe*,[39] as well as a number of High Court decisions. Based on that analysis and the amounts awarded in or following the Court of Appeal decisions, Mallon J stated:

> [38] The cases indicate that the plaintiff will ordinarily need to pay the following by way of compensation:
>
> (a) The costs associated with obtaining legal access. …
>
> (b) All of the diminution in the value of the defendant land attributable to granting legal access to the plaintiff, if there is any such diminution properly proven on the evidence.
>
> (c) Around 20-36 per cent of the increased value in their land from obtaining legal access.
>
> [39] A different approach might be appropriate where there are special circumstances:
>
> (a) These special circumstances might relate to what a willing buyer and willing seller would agree to in the situation. For example, where a payment on the above approach would lead to an overall payment which is too great relative to the cost of forming access and the value of the property; or

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37 *Lowe v Brankin* (2005) 6 NZCPR 607 (CA).

38 *Hajnal v Asmussen* [2010] NZCA 410, (2011) 12 NZCPR 169.

39 *MacRae v Walshe* [2013] NZCA 664, (2013) 15 NZCPR 254. Leave to appeal to the Supreme Court was subsequently declined in *MacRae v Walshe* [2014] NZSC 96.

> (b) They might relate to whether compensation is payable at all. For example, where legal access was always intended but a mistake was made in attempting its creation.
>
> [40] Overall, the Court is seeking to arrive at a fair price for the legal access in the particular circumstances of the case. …

[138] The decisions in *Drexel* and *Dooley* and most of those discussed in *Dooley* addressed a somewhat different situation from the present: that of landlocked land in respect of which the Court may order access and require compensation in accordance with what is now s 330 of the PLA 2007. However, in *MacRae v Walshe*, the Court of Appeal agreed it was proper to assess compensation in applications under s 317 consistently with the principles applied to compensation in applications concerning landlocked land under s 330.[40] At the same time, as Cooke P emphasised in *Drexel*, it is always necessary to bear in mind the particular circumstances of the case under consideration.[41]

[139] I do not consider Mallon J analysis, particularly at [38], can be taken as setting or implementing a rule that when access rights are imposed on land in order to provide access to other land or when an easement is extinguished for one of the reasons in s 317(1) of the PLA 2007, the party whose land is subject to that decision is necessarily entitled to compensation of between 20 and 36 per cent of the increase in value to the other party lands. Justice Mallon conclusions were extrapolations from decisions where the sums were arrived at after considering the application of the willing seller – willing buyer test in the particular circumstances of those cases. As Mallon J went on to note:[42]

> … overall the Court is seeking to arrive at a fair price for the legal access in the **particular circumstances** of the case. The assessment is not an exact science.

[140] In *Drexel*, Cooke P observed that:[43]

> … the hallowed willing seller-willing buyer test, if faithfully applied, solves any problems of principle. Added complications of theory are to be viewed

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40 Above n 39, at [54] and [60].
41 Above n 30 at 328, citing the Privy Council's decision in *Vyricherla v Revenua Divisional Officer, Vizagapatam* [1939] AC 302 (PC) at 312-313.
42 Above n 31, at [40].
43 Above n 30, at 329.

> with suspicion. The real difficulties arise in applying the basic test to the facts and are unlikely to be alleviated by any more refined formula.

[141] In addition, the Courts have emphasised that the test must be at the centre of the assessment of compensation and that valuation evidence must relate to that test.[44] For these reasons, I consider that I must consider the question of compensation from that perspective and not on the basis of any upside-percentage based formula.

[142] It is well-established that in applying the willing seller – willing buyer test, the Court must assess what a willing seller might reasonably expect to obtain from a willing buyer in the particular circumstances,[45] on the open market.[46] The negotiation is hypothetical, and one in which neither party feels compulsion to buy or sell; it is not pressured, but rather friendly.[47] Under the hypothesis, no case of blackmail, or a price forced to unreasonable heights, can arise.[48] The Court, and valuers, must put aside the particular aggravations as between the actual parties to the proceedings.[49]

[143] In *Hajnal v Asmussen*, the Court of Appeal held that in applying the willing seller – willing buyer test, one should first identify the value of the land being taken to establish the starting point against which other factors that could affect the willing buyer and willing seller.[50] It set the starting point by identifying the diminution in value to the property being forced to accept an easement.[51]

Diminution in value to 65 Hinau Road and 46 Ngakoro Road arising from extinguishment of easements

[144] Mr Stevenson said there is no diminution in value to the Reynolds interests' land arising from the extinguishment of the easements. It follows that, adopting the approach of the Court of Appeal in *Hajnal v Asmussen*, Mr Stevenson starting point would be $0. By contrast, Mr Dunlop starting point would be $3,060,000. To

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44 See for example *MacRae v Walshe,* above n 39, at [83].
45 *Jacobsen v Drexel,* above n 30, at 324.
46 Ibid, at 335 per Casey J.
47 Ibid, at 328-329, per Cooke P.
48 Ibid at 334, per Somers J.
49 *Dooley v Sturgess,* above n 31, at [66].
50 Above n 38, at [46].
51 Ibid.

understand the difference, it is necessary to test the assumptions underlying Mr Dunlop valuation.

[145] Like Mr Stevenson, Mr Dunlop valued 65 Hinau Road and 46 Ngakoro Road as development land because that is the highest and best use of that land. However, in assessing the loss in value to the land, Mr Dunlop made assumptions that were not consistent with that initial premise.

[146] Mr Dunlop said the loss in value to 65 Hinau Road was in two respects:

(a) An "attractive estate", by which it is clear that Mr Dunlop meant 65 Hinau Road in its current state, would be adversely affected by traffic associated with the neighbouring development; and

(b) The loss of 65 Hinau Road competitive advantage over 72 Hinau Road.

[147] In the case of 46 Ngakoro Road, Mr Dunlop said the decrease in value is specifically related to increased competition from 72 Hinau Road "which would not have reasonably have been able to be developed prior to [46 Ngakoro Road][52] under normal circumstances."

[148] Whatever impact an increase of traffic, loss of privacy and noise may have on 65 Hinau Road, if Mr Dunlop is valuing the property as development land, I do not consider that impacts to the property in its current undeveloped state can be relevant to that valuation, even if Francis and Juliet Reynolds may decide not to develop the land for some years, if ever. If the valuation is of the hypothetically developed land, the impacts must be on the hypothetical development. Impacts such as increased traffic, noise and loss of privacy would be far less significant to a development on 65 Hinau Road because such a development will create much the same impacts and will require its own increased access, whether that is through the extended Hinau Rood or some other accessway.

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[52] Mr Dunlop identified Richard and Kirsten Reynolds' property as 95 Hinau Road rather than 46 Ngakoro Road, but it is the same property.

[149] Furthermore, the asserted impacts are impacts that arise from a development being undertaken consistently with the Hingaia 1 Precinct Plan in the operative Auckland Unitary Plan. Accordingly, they are impacts that any purchaser of 65 Hinau Road would know would be likely to arise in whatever sequence 72 Hinau Road, 65 Hinau Road and 46 Ngakoro Road are developed. For these reasons, I do not accept Mr Dunlop opinion that the Parklands development of itself results on a loss of value of approximately 10 per cent on the hypothetically developed land.

[150] In addition, the impacts Mr Dunlop has taken into account are not impacts that arise from any loss of the rights that relate to the purposes of the easements: access and services. As already discussed, extinguishment of the easements will not result in any loss of access or services. Rather, they are impacts that arise because the development is able to proceed because the easements have been extinguished. If they are relevant, therefore, they are in the context of the loss of the competitive advantage which Mr Dunlop says is the other driver of diminution of value.

[151] Mr Dunlop says that the easements provide an expectation that Parklands would not be able to develop 72 Hinau Road until after 65 Hinau Road and 46 Ngakoro Road had first been developed and that the Reynolds interests should be compensated if extinguishment of the easements alters that expectation. It is clear from Mr Dunlop affidavit and from his oral evidence that he reaches that conclusion because he assumes that the fact of an easement constitutes a complete fetter on the rights on the owner of the burdened land irrespective of the purpose of the easement. I consider that Mr Dunlop assumption is wrong as a matter of law and for that reason a valuation based on such an assumption is unreliable.

[152] I agree that the fact of the easements confers a benefit that needs to be taken into account when considering what a willing buyer would pay when applying the willing seller – willing buyer test. It is part of the power to bargain that Cooke P referred to in *Drexel*. I do not agree, however, that the existence of the easements confers a right to delay or block Parklands' development irrespective of the purposes of the easements and irrespective of whether those purposes can be met by other means.

[153] As the Courts have said, easements and covenants are valuable property rights that should not lightly swept. But, contrary to Mr Salmon submissions, easements do not by their nature confer rights that are "almost as good as fee simple". If an easement holder uses its rights to try to extract value that is entirely collateral to the purposes for which the easement was granted, the holder of the fee simple can come to the Court and seek its extinguishment if it can be shown that one or more of the circumstances in s 317(1)(a) of the PLA apply.

[154] Section 317 is remedial, as the Court of Appeal noted in *Okey v Kingsbeer*.[53] So too is s 328 of the PLA 2007, the provision allowing the Courts to grant access to landlocked land. As the Court of Appeal said in *Lowe v Brankin* about the application of the predecessor section to s 328:[54]

> Parliament has enabled the High Court to intervene where there is not reasonable access to land-locked land, by investing the High Court with jurisdiction of a broad equitable character. When the jurisdiction is invoked, a landowner cannot simply stand on his or her title.

[155] That analysis must also apply when the equitable jurisdiction under s 317 is invoked. It follows that an easement holder cannot simply stand on its rights and insist that it be compensated for the loss of an advantage that is entirely collateral to the purposes for which the easement was granted. It may say that the loss of that advantage should be factored the overall assessment of what a willing buyer will pay a willing seller to remove the easements. But I do not accept that a loss of a competitive advantage is itself a proven loss to be brought to account in the calculation of diminution of value.

[156] That is because any advantage or leverage conferred by the fact of an easement is contingent on the nature and purposes of the easement on the circumstances of the case and, in particular, whether the purposes of the easement can be met by some other means. Those are matters for determination by the Court when it considers what a willing buyer, not forced by circumstances to sell its potentiality for anything it can get, and a willing seller, not driven to buy, might agree.

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53 *Okey v Kingsbeer*, above n 28, at [50].
54 Above n 37, at [37].

[157] I am reinforced in that conclusion when comparing the circumstances of this case with the earlier decisions. In all of the landlocked cases, the diminution of value was based on assessments of the reduced value of the land that resulted from rights of access being imposed. While collateral consequences of that access may have been taken into account, they were directly related to the exercise of the rights conferred. Similarly, in cases involving modification or extinguishment of an easement or covenant, the diminution of value was directly related to the exercise or loss of the right to exercise the rights conferred by the easement or covenant.

[158] For example, in *MacRae v Walshe*, the Court considered the loss in value resulting from granting greater rights of access as a consequence of modifying the easement.[55] In *Mikitasov v International Recruitment Partners Ltd*, the District Court considered the impact on the value of the property as a whole that arose from the loss of access consequent upon the extinguishment of part of an easement.[56]

[159] As far as I am aware, there has been no case where diminution of value of the property of the party negatively affected by the Court order has been assessed only by reference to the loss of a collateral advantage.

[160] For these reasons, I do not accept that the diminution of value of the Reynolds interests' properties can properly include an amount attributable to a loss of advantage that is unrelated to the loss of the exercise of the rights for which the easements were granted.

[161] Accordingly, I consider that extinguishment of the easements will not result in any significant decrease in value to 65 Hinau Road and 46 Ngakoro Road when those properties are valued at their highest and best values.

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55 Above n 39, at [83]-[89]. The Court found there was no loss in value to the land and access to the land would be improved if the easement were modified and the road sealed.

56 *Mikitasov v International Recruitment Partners Ltd* [2011] DCR 623 (DC). The District Court Judge's reasoning was upheld by Duffy J in *Mikitasov v Little* [2012] NZHC 1100, (2012) 13 NZCPR 271 and, subsequently, the Court of Appeal in their refusal to grant leave to appeal in *Mikitasov v Little* [2013] NZCA 604.

Increase in value to 72 Hinau Road arising from extinguishment of easements

[162] Mr Savage and Mr Stevenson did not address this question in the submissions and valuation evidence on behalf of Parklands. In his affidavit in reply to Mr Dunlop affidavit, however, Mr Stevenson gave evidence of two valuations he had undertaken of 72 Hinau Road. He said that one of those had been prepared on the same basis as Mr Dunlop "with access" valuation but took into account a revised subdivision plan for the development and up to date development costs. Mr Stevenson valuation on that basis produced a figure of $34,785,000. However, he then made further adjustments to take account of the need to exclude some sites because of the impact of traffic noise from the Southern Motorway and likely delays to Stages 2 and 3 because of water access issues. He also made an allowance to take account of the uncertain impacts of the COVID-19 emergency on the Auckland property market. This resulted in a final valuation of $30,000,000.

[163] It is unnecessary to go into the detail of the analysis behind Mr Stevenson valuation except to note that, as discussed below, Mr Salmon challenged the admissibility of the costings relied on by Mr Stevenson. These costings were annexed to Mr Stevenson's affidavit in reply and were said to have been prepared by a person at Wood and Partners Consultants Ltd (Woods), who have provided engineering, planning, urban design and survey services to Parklands in relation to the development at 72 Hinau Road.

[164] For the sake of completeness, I note that Nigel Noma, Mr Joseph Noma son, also gave evidence about the value of 72 Hinau Road and was cross-examined in some detail on valuation aspects by Mr Salmon. However, while Mr Nigel Noma has experience in valuation issues because he is involved in sales and marketing for Parklands, he is not a valuer. His affidavit was sworn in support of Parklands' application for a priority fixture. He acknowledged in cross examination that the valuation figures he had used in that affidavit were based on a valuation prepared by Mr Stevenson in 2017. Given that Mr Stevenson and Mr Dunlop, who are both valuers, in the event, have used more recent valuations with the same valuation

approach, I have found it more useful to focus on their evidence, particularly bearing in mind Mallon J's observation in *Dooley* that assessing value is not an exact science.[57]

[165] Mr Dunlop valued 72 Hinau Road on two bases: the first "with access"; the second "without access". Mr Dunlop initially put the value of 72 Hinau Road with access at $49,550,000. However, to assist the Court, he showed his figures would be adjusted if he used the Woods figures used by Mr Stevenson. His value on that basis was $36,210,000.

[166] Mr Dunlop explained that his "without access" figure assumed that Parklands would have to purchase alternative access to its development, either from NZ Bloodstock which has land to the east of the easement, of from a landowner with property on Park Estate Road to the south. His figures did not include any price for that notional purchase. Instead, he attributed lower gross realisation values to the lots created by the subdivision and increased the holding and opportunity costs to reflect the increased time taken to resolve access. His initial net valuation came to $36,660,000 which, after taking into consideration the Woods figures used by Mr Stevenson, would be adjusted to $28,230,000. The difference between the two revised figures is $7,980,000 – which compares with a difference of $12,890,000 between Mr Dunlop initial "with access" and "without access" valuations.

[167] In making these adjustments, Mr Dunlop made it clear that he was not withdrawing from his original calculation of compensation because he had not had the opportunity to revise and review the Woods figures. He acknowledged, however, that the compensation figure would likely reduce following such a review.

[168] Before assessing the valuation evidence concerning 72 Hinau Road, it is necessary to decide whether the Woods costings attached to Mr Stevenson affidavit in reply are admissible and reliable.

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[57] Above n 31, at [40].

Admissibility of Woods costings

[169] Mr Stevenson was unable to identify the person at Woods who prepared the breakdown. No witness from Woods was called to give evidence of those costings, even though Mr Flood of Woods gave evidence on the services provided by Woods to Parklands in relation to the development, including evidence about the frequency and manner in which Woods provided information to Parklands.

[170] Mr Salmon submitted that the Woods costings were hearsay and were not admissible. Mr Savage did not address me on the point. I am satisfied, however, that the costs breakdown attached to Mr Stevenson affidavit in reply comes within the definition of "business record" in s 16(1) of the Evidence Act 2006.

[171] The document is printed with a "Woods" logo and is headed:

> **Parkland Properties Ltd**
>
> **72 Hinau Road (STAGES 1, 2 3)**
> **HINGAIA**
>
> **COSTS TO COMPLETE**

[172] I am satisfied from the appearance of the document, and by the undisputed fact that Woods are consultants to Parklands on the development at 72 Hinau Road, that the document was made in the course of business. I infer that it is likely to have been made from information supplied directly or indirectly by persons who may reasonably be supposed to have had personal knowledge of the matters dealt with in the document.[58]

[173] I accept that Mr Flood, who was said by Mr Stevenson to have confirmed to him the accuracy of the costings in the document, told Mr Salmon in cross examination that the most recent breakdown of costings on the project had been prepared earlier than the March 2020 COVID-19 lockdown and that the document attached to Mr Stevenson affidavit was dated 14 May 2020. However, Mr Flood was giving evidence before the admissibility of the document was in issue and no question was

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[58] In *Keshvara v Blanchett* [2012] NZCA 553, (2012) 21 PRNZ 475, the Court of Appeal confirmed, at [32], that it is appropriate for a Court to draw inferences concerning the application of the definition of "business records."

put to him about that particular document. Notwithstanding Mr Flood's evidence, I consider it more likely than not that the document is genuine.

[174] I am also satisfied, in accordance with s 19(1)(b) of the Evidence Act that undue expense and delay would have been caused by requiring the person who prepared the document to give evidence. In addition, Mr Dunlop did not dispute the validity of the Woods costing even if he expressed a wish to review and revise "some of the Woods elements". I am satisfied, therefore, that the Woods costs are likely to be the most reliable evidence of the actual and projected costs to Parklands to complete its development and should be admitted in evidence.

Overall assessment of increase in value of 72 Hinau Road as a consequence of extinguishing the easements

[175] Mr Savage submitted that Mr Dunlop evidence should not be accepted because Mr Dunlop valued 72 Hinau Road on the basis it was landlocked and that was an incorrect premise. I agree that 72 Hinau Road is not landlocked in a technical sense. Parklands has its own right of access over the easement land which it can exercise to the fullest extent provided it does not interfere with the Reynolds interests' exercise of their easement rights. It is on this basis that Parklands has been able to undertake the earthworks and other works necessary to bring Stage 1 of its development close to completion. In that sense, Mr Dunlop characterisation of 72 Hinau Road as landlocked is not accurate.

[176] However, it is undoubtedly the case that Parklands has unresolved access issues. It cannot release the titles for its subdivided lots until title to the access road over the easement is vested in the Auckland Council, and that cannot happen unless the easements are surrendered or extinguished. For that reason, I consider that it was appropriate for Mr Dunlop to value 72 Hinau Road on a "with access" and a "without access" basis.

[177] While Mr Stevenson was cross-examined at some length and in considerable detail in an apparent effort to elicit a concession that he had under-valued 72 Hinau Road, Mr Stevenson and Mr Dunlop both acknowledged that there was not a great deal of difference in their valuations of 72 Hinau Road on a "with access basis",

particularly once Mr Dunlop valuation was adjusted to take account of the Woods costs: $34,785,000 for Mr Stevenson; $36,210,000 for Mr Dunlop.

[178] Mr Stevenson then made further deductions, which were not made by Mr Dunlop, to take account of objections from Transit New Zealand to proposed lots close to the Southern Motorway, uncertainties over the timing for Stages 2 and 3 because of water access issues, and COVID-19, to produce a final figure of $30,000,000. Neither witness was tested as to the validity or otherwise of those further deductions. In the circumstances, and again bearing in mind assessing value is not an exact science, I proceed on the basis that the value of 72 Hinau Road without access issues is $33,100,000 which is roughly the mid-point between Mr Stevenson final figure and Mr Dunlop figure once adjustments are made to take account of the Woods costings.

[179] Mr Dunlop has provided the only evidence of the value of 72 Hinau Road without the access issues rectified. That evidence was not seriously challenged in cross-examination. I am satisfied, therefore, that it should be accepted for the purpose of establishing the benefit to Parklands of the easements being extinguished. As already noted, Mr Dunlop "without access" valuation came to $28,230,000 once the valuation was adjusted to take account of the Woods figures. This means that the benefit to Parklands of having the easements extinguished is $4,870,000, being the difference between my assessment of the "with access" value of $33,100,000 and Mr Dunlop adjusted "without access" value of $28,230,000.

What is the fair compensation to be awarded to the Reynolds interests?

[180] I have held that no amount should be awarded for diminution in value of the Reynolds interests' properties. Based on Mr Salmon submission that the Reynolds interests should be awarded compensation at the top end of the range discussed by Mallon J in *Dooley*, that is, 36 per cent of the benefit to Parklands, that would produce a final figure of $1,753,200 to be paid by Parklands. While that is considerably less than the amount sought by the Reynolds interests, I do not consider that an award of that size is appropriate, having regard to what a willing seller and a willing buyer would agree in a friendly negotiation in the circumstances of this case.

[181] As Cooke P said in *Drexel*:[59]

> In assessing compensation purely sentimental matters have to be put aside … . So too of course any question of personal impecuniosity or affluence … . Subject to those qualifications, all factors of benefit or detriment on either side are material under the section, including for instance any inconvenience or disturbance that the owner of the servient or transferred land may suffer and any advantage that he may gain. These are all considerations which would legitimately influence the parties in the hypothetical friendly negotiation. They all go to what sum is reasonable as the value or price or consideration or compensation — terms which seem to me to be interchangeable and identical in effect when a fair figure has to be arrived at as between the parties … .

[182] The circumstances of the present case are that:

(a) Two sets of property developers, namely Mr Joseph Noma and some of the Reynolds interests, operating through corporate structures, severally purchased adjacent properties serviced by adjacent parallel strips of land over which they each had easements. Under the partition agreement they signed at the time of the original purchase, they agreed:

(i) That the easement land would not be valued for the purposes of working out how to adjust the boundaries between their two properties in order to achieve two properties of equal value.

(ii) Each was to contribute half the costs of developing the easement land into a formed road if the Council required the road to be formed. It was implicit in the agreement that no compensation would be paid in either direction if the road was to be formed.

(iii) To cooperate in good faith to co-ordinate their separate developments, even though that commitment to cooperate was not incorporated into a legally binding agreement.

(b) Over the following years, some of the Reynolds interests took a leading role in successfully promoting a plan change to the Papakura District

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[59] Above n 30, at 329, citing *Vizagapatam,* above n 41.

Plan which envisaged the southward extension of Hinau Road over the easement land.

(c) In 2007, some of the Reynolds interests sought and obtained resource consents for the Karaka Lakes subdivision on the basis of documents which provided for the Reynolds interests' side of the easement strip to vest in the Papakura District Council and envisaged Hinau Road being widened and extended to include Parklands' side of the easement strip when there was further development. Parklands agreed to surrender its easements over the Reynolds interests' easement strip at no cost.

(d) Subsequently some of the Reynolds interests, operating under a different corporate structure, successfully promoted the Hingaia 1 Structure Plan, which was included the Auckland Unitary Plan and which envisages the widening and extension of Hinau Road over the full extent of the remaining easement strip and beyond as part of a new collector road.

(e) Over the period the above developments were taking place, the Reynolds interests were developing the land to the north, west and south of the land that benefited from the easements.

[183] Given that history, I am satisfied that a willing seller in the position of the Reynolds interests and a willing buyer in the position of Parklands who were engaged in friendly negotiations and who were not looking to extract an unreasonable price forced by necessity, would take into account that:

(a) It was envisaged from the time they had each purchased their land that it was likely that their respective properties would be developed at some future point, that the development should be undertaken cooperatively, and it was likely that all of the easement land would become a public road and would vest in the local Council.

(b) The Reynolds interests themselves had taken a leading hand in ensuring that the planning instruments of the relevant councils enabled this to happen, had obtained resource consents for their own development on that basis, and had not been asked to pay any compensation when Parklands had agreed to surrender their easements over the Reynolds land.

(c) There was no expectation in the parties' original or subsequent dealings, or in the planning instruments, or in consents granted under those instruments, that either party had priority over the other in terms of their developments.

(d) The Reynolds interests did not use and had no need for the services easements and Richard and Kirsten Reynolds did not use and had no need for the right of way easements.

(e) Once the Parklands land was developed, it was always likely that Francis and Juliet Reynolds would be asked to surrender their easements over the Parklands land and would lose their semi-private driveway over the Parklands land, but they would have known they would have access to their property from Hinau Road regardless. They would also have known of the likely effects of the Parklands' development, which they knew from the outset was likely to happen, even if they chose to retain Villa Rosa as a family home.

[184] Having taken those considerations into account, I consider that a willing buyer would expect to pay, and a willing seller would expect to receive, a sum sufficient to cover the seller costs associated with the surrender or extinguishment of the easements. On top of that, a reasonable buyer would pay a modest sum to the resident reasonable seller in recognition of the disruption and inconvenience caused by the development. But the reasonable seller would not expect to receive a sizeable proportion of the buyer profit because they are both commercial parties who recognise the value of an ongoing cooperative relationship.

[185] For these reasons, a payment of even 20 per cent of the value to Parklands, that is, $974,000, would be out of the question given the minimal impact that loss of the easements would have for the Reynolds' interests. Even a payment of 10 per cent or $487,000 would be generous, having regard to the expectations of the parties when they first agreed to buy the land.

[186] Putting aside the aggravations that followed the forfeiture of the Karaka Business Park deposit and the cutting down of some plan trees, and recognising that extinguishment of the easements will deliver real value to Parklands, I am satisfied that a payment of $300,000 would be equitable and appropriate in the circumstances and I order accordingly.

Result

[187] In accordance with s 317 of the Property Law Act 2007, I order that:

(a) The right of way and services easements held by the second and third respondents over the land owned by the applicant at 72 Hinau Road, Hingaia be extinguished; and

(b) The applicant pay the second and third respondents jointly the sum of $300,000 as compensation for the extinguishment of the easements.

Record of undertaking by Parklands to surrender remnant easements

[188] I record the undertaking by Mr Savage on behalf of Parklands that if the Court were to extinguish the easements over its land, it would also surrender its remnant easements over the Reynolds interests' land. I have taken account of that undertaking in my assessment of compensation for extinguishment and consider that no compensation is payable for that surrender.

Costs

[189] Since the result is some distance from the outcome sought by Parklands and even further from that sought by the Reynolds interests, my preliminary view is that costs should lie where they fall.

[190] However, if the parties wish to make submissions on costs, which I assess on a 2B basis, they may file memoranda.

[191] Any memorandum seeking costs, not exceeding five pages, shall be filed and served by 27 November 2020.

[192] Any memorandum in reply, not exceeding four pages, shall be filed and served by 11 December 2020.

_____

G J van Bohemen J

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